Supreme Court, U.S.
FILED

941904 MAY 17 1995

OFFICE OF THE CLERK

No. --

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

RADIO ASSOCIATION DEFENDING AIRWAVE RIGHTS, INC. (RADAR);
FRANK FIGUERO

Petitioners

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION,
Federal Highway Administration

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

STEVEN P. RESNICK
(Counsel of Record)
W. KEVIN REYNOLDS
116-D Cathedral Street
Annapolis, Maryland 21401
(410) 267-8400
Attorneys for Petitioner

---

138 pp

QUESTIONS PRESENTED

1. Was the constitutionally required separation of powers between coordinate branches of the federal government breached by Congressional enactment of a rider to the 1992 Department of Transportation Appropriations Act, which required the Federal Highway Administration (FHWA), an Executive Branch Agency, to institute a rulemaking to ban radar detectors in Commercial Motor Vehicles (CMV's), where FHWA had twice refused to initiate this rulemaking because it had determined that a rule was not justified upon its professional review of all safety data and was prohibited by Executive Order 12621 which governed its actions?

2. May, consistent with the strictures of the Administrative Procedure Act, 5 U.S.C. § 706, and the provisions of the Motor Carrier Safety Act, 49 U.S.C. App. § 2505 (c)(2), which prohibits the unnecessary preemption of State laws, the "displeasure" of the Senate Appropriations Committee properly result in a rulemaking banning radar detectors in CMV's which superseded the legislative determination of 40 states which had rejected radar detector bans?

3. Did the FHWA's unexplained reversal of its position in response to the Rider enacted to the Appropriations bill governing its budget, ignore the mandated evaluation of the cost of the regulation, including the cost to the 50 states in the enforcement of the administrative ban, and result in an unfunded administrative mandate to the 50 states, which Congress had refused to impose by enacting legislation banning the use of radar detectors in CMV's?

4. Is FHWA's rule, which makes no assessment of the threshold issue of whether radar detectors cause or contribute to the risk of CMV accidents, which fails to evaluate the effect of the rule itself upon speed distributions

within the overall traffic stream and the risk of CMV accidents, which does not address the purported efficacy of the rule in light of acknowledged CMV crash data regarding heavy trucks, which assumes the efficacy of detector bans to be imposed upon states which have refused to ban detectors, and which reverses without explanation or response to the comments which it solicited, FHWA's repeated professional judgment that no rule banning radar detectors should issue, arbitrary and capricious?

PARTIES

The Petitioners are the Radio Association Defending Airwave Rights, Inc. (RADAR) and Frank Figuero. RADAR is a trade association representing nationwide the manufacturers of radar detectors and motor vehicle operators who use radar detectors. Frank Figuero is a commercial motor vehicle (CMV) operator who uses his radar detector while traveling in interstate commerce. Petitioners have no parent companies or subsidiaries required to be listed pursuant to Rule 29.1.

The Respondent, The United States Department of Transportation, Federal Highway Administration (FHWA), is an executive agency of the United States Government.

TABLE OF CONTENTS

Page:

QUESTIONS PRESENTED..... i

PARTIES..... ii

OPINIONS BELOW..... 2

JURISDICTIONAL GROUNDS..... 2

CONSTITUTIONAL PROVISIONS AND STATUTES..... 3

STATEMENT OF THE CASE:

A. JURISDICTION OF THE COURT OF FIRST INSTANCE..... 4

B. REFUSAL OF CONGRESS TO BAN RADAR DETECTORS, EXECUTIVE ORDER NO. 12612, AND FHWA RESPONSE TO §342 5

C. HISTORY OF THE RULE..... 9

REASONS FOR GRANTING THE WRIT:

1. THIS CASE PRESENTS IMPORTANT QUESTIONS REGARDING THE SEPARATION OF CONGRESSIONAL AND EXECUTIVE POWERS WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT. FHWA'S PROFESSIONAL JUDGMENT WAS CLEAR THAT THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT A RADAR DETECTOR

BAN. BASED UPON ITS REVIEW OF TRAFFIC SAFETY DATA, FHWA INTERPRETED THE EXECUTIVE ORDER CONTROLLING ITS ACTIONS TO REQUIRE THAT NO RULE ISSUE. WITHOUT THE INTRODUCTION OF LEGISLATION SEEKING TO AMEND OR REVISE THE MOTOR CARRIER SAFETY ACT OR TO PROHIBIT RADAR DETECTORS IN COMMERCIAL MOTOR VEHICLES AND WITHOUT THE BENEFIT OF CONGRESSIONAL HEARINGS ADDRESSED TO THE SUBSTANCE OF A RADAR DETECTOR BAN, CONGRESS USURPED FHWA'S EXECUTIVE FUNCTION BY ENACTMENT OF A RIDER TO THE 1992 DEPARTMENT OF TRANSPORTATION APPROPRIATIONS ACT REQUIRING FHWA TO REVERSE ITS PROFESSIONAL JUDGMENT AND TO COMMENCE RULEMAKING TO BAN RADAR DETECTORS IN CMV'S..... 16

A. SEPARATION OF POWERS..... 16

B. THE RULE WAS THE RESULT OF IMPROPER CONGRESSIONAL PRESSURE..... 21

2. THE RIDER TO THE 1992 DEPARTMENT OF TRANSPORTATION APPROPRIATIONS ACT IGNORED MANDATED EVALUATION OF COSTS TO THE 50 STATES WHICH RESULTED IN AN UNFUNDED ADMINISTRATIVE MANDATE TO THE 50 STATES WHICH CONGRESS PREVIOUSLY REFUSED TO ENACT..... 24

3. THE SIXTH CIRCUIT DEPARTED FROM THE USUAL COURSE OF JUDICIAL PROCEEDING IN FINDING THAT THE RADAR DETECTOR BAN WAS NOT ARBITRARY AND CAPRICIOUS..... 27

CONCLUSION..... 29

APPENDIX:

Radio Association Defending Airwave Rights, Inc. v. United States Department of Transportation, Federal Highway Administration, No.94-3140, slip. op. (6th Cir. February 17, 1995)..... A-1

Final Rule of the United States Department of Transportation, Federal Highway Administration, amending 49 CFR Parts 390 and 392 to ban the use of radar detectors in all commercial motor vehicles. [FHWA Docket No. MC-90-141 RIN 2125-AC69]. (Issued December 14, 1993, Effective Date January 20, 1994). 58 Federal Register, Vol.58, No.243, Tuesday December 21, 1993 at p. 67370-67375..... A-30

Notice of Proposed Rulemaking, Radar Detectors in Commercial Motor Vehicles, 57 Federal Register, Vol.57, No.16, Friday, January 24, 1992 at p. 2885-2888 A-51

Constitutional Provisions

United States Constitution, Article I, Section 1 A-69
United States Constitution, Article I, Section 7 A-69
United States Constitution, Amendment X A-70

Statutes

5 U.S.C. Section 706	A-71
28 U.S.C. Section 2321	A-72
28 U.S.C. Section 2342	A-73
49 U.S.C. Section 3102	A-75
49 U.S.C. App. Section 2501	A-76
49 U.S.C. App. Section 2502	A-76
49 U.S.C. App. Section 2503	A-77
49 U.S.C. App. Section 2505	A-78
Pub. L. No. 102-143, Section 342	A-81

Regulations

49 CFR Section 390.5	A-82
49 CFR Section 392.71	A-82

Executive Orders

Executive Order 12612 (October 26, 1987)	A-83

Legislative Materials

Senate Appropriations Committee Report
S. Rep. No. 150, 103d Cong., p. 111-12 (1993) A-90

Excerpt of transcript before a subcommittee
on Appropriations, House of Representatives
103 Congress, 1st Session, p. 587-98 A-92

TABLE OF AUTHORITIES

Cases:	Page:
Action on Smoking and Health v. CAB, 699 F.2d 1209, 1217 (D.C.Cir. 1983)	27
Appalachian Power Co. v. Train, 545 F.2d, 1351 (4th Cir. 1976)	24
Citizens Comm. Against Interstate Route 675 v. Lewis, 542 F. Supp. 496 (S.D. Ohio 1982)	22
D.C. Federation of Civic Ass'ns v. Volpe, 459 F.2d 1231, 1245 (D.C. Cir. 1971), cert. denied, 405 U.S. 1030 (1972)	21, 22
Garcia v. San Antonio Metro, 469 US 528 (1985).	20
Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971)	28
Hooker Chemicals & Plastics, v. Train; 537 F.2d 629 (2d Cir 1976)	24
INS v. Chada, 462 U.S. 919 (1983)	20
International Harvester Co. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973)	27, 29

Ladies Garment Workers v. Donovan, 722 F.2d 795 (D.C. Cir. 1983) 27

Metropolitan Washington Airport Auth. v. Citizens for Abatement of Aircraft Noise, Inc., 501 U.S. 252 (1991) 18, 19

Motor Vehicle Mfrs. Ass'n v. State Farm Auto Ins. Co., 463 U.S. 29 (1983) 27, 29

National Black Media Coalition v. FCC, 775 F.2d 342 (D.C. Cir. 1985). 28

National Truck Equipment v. NHTSA, 919 F.2d 1148 (6th Cir. 1990) 28

Peter Kiewet Sons' Co. v. Inited States Army Corps of Eng'rs, 714 F.2d 163 (D.C. Cir. 1983) 21

Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 1375 27

Public Citizens Health Research Group v. Tyson, 796 F.2d 1479 (D.C. Cir 1986). 27

Radio Association Defending Airwave Rights, Inc. v. United States Department of Transportation, Federal Highway Administration, No. 94-3140, slip. op., 47 F.3d 794 (6th Cir. February 17, 1995) 2, 18, 21, 23, 25

Ritter Transport v. ICC, 684 F.2d 86 (D.C.Cir. 1982). 27

Rodway v. USDA, 514 F.2d 809 (D.C. Cir 1975) 27, 29

Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d. Cir. 1965) 27

Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981) 21

Town of Orangetown v. Ruckleshaus, 740 F.2d 185, 188 (2d Cir. 1984) 22

Constitutional and Statutory Provisions:

United States Constitution, Art. 1 § 7 19

United States Constitution, Amendment X 20

5 U.S.C. §706 i

28 U.S.C. §1254 2

28 U.S.C. §3221 4

28 U.S.C. §2342 4

28 U.S.C. §2344 5

49 U.S.C. § 3102 4, 24

49 U.S.C. §31,131 et seq. 4

49 U.S.C. §31,502 4

49 U.S.C. App. §2505	i, 4, 23
Pub. L. No. 102-143, §342	5, 7, 8, 12, 13, 17, 18, 19, 29
Pub. L. No 103-272	4
Rules:	
Supreme Court Rule 29.1	iii
Regulations:	
49 C.F.R. Part 390	2, 15
49 C.F.R. Part 392	2, 15
49 C.F.R. Part 392, Sect. 392.71	15
49 C.F.R. Part 392, Sect. 390.5	2
57 Fed. Reg. 2885 (Notice of Proposed Rulemaking)	9, 12, 17
58 Fed. Reg. 2885 (Final Rule)	2
Congressional Bills and Legislative Materials:	
S. 1418, 103rd Cong., 1st. Sess. (1993)	5
H.R. 881, 102nd Cong., 1st. Sess. (1991)	5

H.R. 224, 101st Cong., 1st. Sess. (1989) 5

H.R. 2102 101st Cong., 1st. Sess. (1989) 5

Senate Appropriations Committee Report, S. Rep. No. 150, 103d Cong., 1st. Sess. 111-12 (1993) 13, 14, 15

Senate Report Number 102-148, 102d Congress First Session, page 90 (1991) 9, 17

Executive Orders:

Executive Order 12621 i, 5, 6, 8, 10, 17, 18

No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

RADIO ASSOCIATION DEFENDING AIRWAVE RIGHTS, INC. (RADAR);
FRANK FIGUERO

Petitioners

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION,
Federal Highway Administration

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners, Radio Association Defending Airwave Rights, Inc. (RADAR) and Frank Figuero, respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on February 17, 1995.

REFERENCE TO OPINIONS BELOW

The Final Rule of the United States Department of Transportation, Federal Highway Administration, amending 49 CFR Parts 390 and 392 to ban the use of radar detectors in all commercial motor vehicles (CMVs) as defined in 49 CFR 390.5 [FHWA Docket No. MC-90-141 RIN 2125-AC69] (Issued December 14, 1993, Effective Date January 20, 1994) is set forth in the Appendix at page A-30-50. The Final Rule of the FHWA is published in Federal Register, Vol.58, No. 243, Tuesday December 21, 1993 at p. 67370-67375.

The judgment for which a writ of certiorari is sought to the United States Court of Appeals for the Sixth Circuit, denies the Petition filed by Petitioners herein to enjoin, suspend, and determine the validity of the Rule of the FHWA banning the use of radar detectors in CMVs, Radio Association Defending Airwave Rights, Inc. v. United States Department of Transportation, Federal Highway Administration, No. 94-3140, slip. op. (6th Cir. February 17, 1995) and is set forth in the Appendix at page A-1 - A-29. The citation to the published opinion is Radio Association Defending Airwave Rights, Inc. v. United States Department of Transportation, Federal Highway Administration, 47 F.3d 794 (6th Cir. 1995).

STATEMENT OF JURISDICTION OF THE UNITED STATES SUPREME COURT

The date of the entry of the judgment of the United States Court of Appeals for the Sixth Circuit sought to be reviewed is February 17, 1995. The statutory provision conferring jurisdiction on the United States Supreme Court to review the judgment in question by writ of certiorari is 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

The provisions are lengthy and are set forth in the Appendix beginning at pages A-69-94.

Constitutional Provisions

United States Constitution, Article I, Section 1	A-69
United States Constitution, Article I, Section 7	A-69
United States Constitution, Amendment X	A-70

Statutes

5 U.S.C. Section 706	A-71
28 U.S.C. Section 2321	A-72
28 U.S.C. Section 2342	A-73
49 U.S.C. Section 3102	A-75
49 U.S.C. App. Section 2501	A-76
49 U.S.C. App. Section 2502	A-76
49 U.S.C. App. Section 2503	A-77
49 U.S.C. App. Section 2505	A-78
Pub. L. No. 102-143, Section 342	A-81

Regulations

49 CFR Section 390.5	A-82
49 CFR Section 392.71	A-82

Executive Orders

Executive Order 12612 (October 26, 1987)	A-83

Legislative Materials

Senate Appropriations Committee Report
S. Rep. No. 150, 103d Cong., 1st Sess.
p. 111-12 (1993) A-90

Excerpt of transcript before a subcommittee
on Appropriations, House of Representatives
103 Congress, 1st Session, p. 587-98 A-92

STATEMENT OF THE CASE

A. JURISDICTION OF THE COURT OF FIRST INSTANCE

Jurisdiction was asserted by the Federal Highway Administration (FHWA) under the Motor Carrier Safety Act, 49 U.S.C. § 3102, and 49 App. U.S.C.§ 2505[1], to issue a rule prohibiting the use of radar detectors in commercial motor vehicles (CMV's) engaged in interstate commerce. The challenged regulation was issued on December 14, 1993 as the final rule of the FHWA.

Jurisdiction of the Court of First instance, the United States Court of Appeals for the Sixth Circuit, was invoked by Petitioners (parties to the rulemaking proceeding) on a Petition seeking judicial review of that rulemaking, and was

---

[1] The 1984 Safety Act was recodified at 49 U.S.C. § 31,131 et seq. by Pub. L. No. 103-272 on July 5, 1994. 49 U.S.C. § 3102(b) of the 1935 Act, as amended, was also recodified by Pub. L. No. 103-272 at 49 U.S.C. § 31,502(b). Citation to the previous statutes are used in this Petition for clarity since the changes were not substantive and the previous provision were used by the Sixth Circuit in their Opinion.

predicated upon 28 U.S.C. § 2321(a) and 2342 (5). The petition was filed in the United States Court of Appeals for the Sixth Circuit within the sixty day period prescribed by 28 U.S.C. § 2344.

The petition challenged the rule on the grounds that the FHWA departed from historical precedent, lacked technical justification, and was motivated by improper political pressure.

The petition further addressed §342 of Public Law 102-143. That section, which was enacted by a rider to the Department of Transportation and Appropriations Act of 1992, required the FHWA to reverse its professional judgment, based upon its consideration of all traffic safety data, that no rulemaking to ban detectors in CMV's should issue. FHWA was directed to institute that rulemaking despite its conclusion that the matter was "best left to the states," and notwithstanding its determination that the rulemaking was prohibited by Executive Order 12612.

Petitioners claimed that § 342 breached the separation of powers mandated between the legislative and executive branches of the federal government.

B. REFUSAL OF CONGRESS TO BAN RADAR DETECTORS, EXECUTIVE ORDER NO. 12612, AND FHWA RESPONSE TO §342

Congress has declined to enact any law prohibiting the use of radar detectors in interstate commerce, thereby refusing to interfere with traditional prerogatives of the states to enforce highway safety, regulate the insurance industry, and to determine the sale of legitimate articles of commerce.[2]

---

[2] See, e.g., S. 1418 (introduced August 6, 1993); H.R. 881 (introduced February 6, 1991); H.R.

Executive Order No. 12612, governs FHWA rulemaking. Enacted on October 26, 1987 (set forth in the Appendix at A-83-89); the Executive Order provides in part:

> Sec. 2 Fundamental Federalism Principles. In formulating and implementing policies that have federalism implications, Executive departments and agencies shall be guided by the following fundamental principles:
>
> (a) Federalism is rooted in the knowledge that our political liberties are best assured by limiting the size and scope of the national government. ...
>
> (e) In most areas of governmental concern, the States uniquely possess the constitutional authority, the resources, and the competence to discern the sentiments of the people and to govern accordingly. In Thomas Jefferson's words, the States are "the most competent administrations for our domestic concerns and the surest bulwarks against antirepublician tendencies." ...
>
> (i) In the absence of clear constitutional or statutory authority, the presumption of sovereignty should rest with the individual States. Uncertainties

---

224 (introduced January 3, 1989); H.R. 2102 (introduced April 21, 1989). Each of these bills proposed to ban use of detectors or to provide penalties for their manufacture, sale and use. Congress declined to enact any of these bills.

> regarding the legitimate authority of the national government should be resolved against regulation at the national level ...
>
> Sec. 3 (b) Federal action limiting the policymaking discretion of the States should be taken only where constitutional authority for the action is clear and certain and the national activity is necessitated by the presence of a problem of national scope. For the purposes of this Order:
>
> (1) It is important to recognize the distinction between problems of national scope (which may justify Federal action) and problems that are merely common to the States (which will not justify Federal action because individual States, acting individually or together, can effectively deal with them.

On two occasions in 1988 and January 1991, the FHWA interpreted this Executive Order to bar the institution of a rule to ban radar detectors in CMV's. Exercising its best independent professional judgment that traffic safety data was inconclusive, that the institution of rulemaking was not necessary, and that a problem of "national scope" had not been presented, the FHWA determined that the decision of whether to ban radar detectors in CMV's was "best left to the States".

By a rider to the Department of Transportation's 1992 Appropriations act, §342 of Public Law 102-143 (signed October 28, 1991), imposed without benefit of a hearing or any proposed legislation addressing the substantive issue of the use of radar detectors, Congress directed FHWA to reverse its position and to vitiate its construction of the Executive Order governing its actions.

In its Notice of Proposed Rulemaking (NPRM), FHWA stated that the rulemaking "responds" to Public Law 102-143, acknowledged that the rule would "limit the policymaking discretion of the States", and stated that its reversal of position was required by and based upon §342:

> The proposed rule would limit the policymaking discretion of the States. The FHWA has reviewed the proposed ban on radar detectors in light of the purposes of the underlying legislation and the Executive Order on Federalism (Executive Order 12612 ,October 26, 1987), which requires Executive departments and agencies to be guided by certain fundamental federalism principles while formulating and implementing policies. These policies have been taken fully into account in the development of this proposed regulation.
>
> In 1988, FHWA received a similar petition from five of the organizations that signed the 1990 petition. On November 8, 1988, the FHWA denied that petition on the grounds that a Federal ban on radar detectors would violate the principles of federalism because the problem "is common to the States and not truly national in scope." The FHWA continues to believe that the enforcement of speed limit laws on the highways is a problem which is, in general, common to the States and not truly national in scope.
>
> * * *
>
> Public Law 102-143 specifically directs the Department of Transportation to issue this proposal. The Senate Committee report on

> Public Law 102-143 stated that, "while the general prohibition of radar detectors is properly left to the States, the use of radar detectors in vehicles in interstate commerce is an appropriate area for the Federal Government to regulate[3]. Federal Register, Vol 57. No. 16 (January 24, 1992) at p.2886 (A-60).
>
> Pointedly FHWA concluded:
>
> It is certified that the policies contained in this document have been assessed in light of the principles, criteria, and requirements of the Federalism Executive Order. Because this notice is being issued in response to a statutory mandate, the FHWA has determined that this action accords fully with the Federalism Executive Order. (Emphasis supplied.) Id. at p. 2887 (A.60).

No clearer statement of the purpose and effect of § 342 can be imagined.

C. HISTORY OF THE RULE

Radar detector use in commercial motor vehicles is legal in 47 of the 50 states. Notwithstanding intense lobbying by the insurance industry before state legislatures to ban detectors, more than two hundred bills to ban detector use have been have been rejected by the

---

[3] Senate Report Number 102-148, 102d Congress, First Session, page 90 (1991) (footnote in original).

legislatures of forty (40) states. (R.35[4], Comment by Radar in response to NPRM, p. 1). Similarly, attempts to deny motor vehicle insurance to detector users have been uniformly rejected by state insurance departments.[5]

Having failed in their "anti-detector" efforts before state legislatures and state insurance commissions, the insurance industry and other opponents of radar detectors petitioned the FHWA in May, 1988, to undertake rulemaking to ban the use of detectors in commercial motor vehicles. On November 8, 1988, FHWA denied that petition:

> The President, in his Executive order on federalism (Executive Order No. 12612), ordered executive departments and agencies to be guided by certain fundamental federalism principles in formulating and implementing policies that have federalism implications. It is our view that the enforcement of speed limit laws on the highways is a problem which is common to the States and not truly national in scope. As a common State problem, we believe that the States, acting either individually or together, can effectively deal with this matter. Moreover, in determining the best methods and means to address in this problem, we believe that the States uniquely

---

[4] In this Petition R-_ indicates the numbered reference to the document in the rulemaking docket.

[5] Insurance commissioners for the states of Arizona, California, Maryland, Colorado, Kentucky, Maine and Maryland have rejected such action by insurers.

> possess the competence to discern the sentiments of the people. Currently, only the District of Columbia and, the states of Connecticut and Virginia have seen fit to pass legislation prohibiting the use of radar detectors. Several other States have considered bills that would prohibit the use of radar detectors; however, they have failed to enact such legislation. The FHWA has carefully reviewed the petition in light of the Executive order and finds that, based on the available information, such action as proposed by the petitioners would be inconsistent with that Executive order." (R.35, Exhibit to Comment of Radar to NPRM).

On July 18, 1990, opponents of detectors filed another petition with FHWA, asking once again that FHWA commence rulemaking to prohibit radar detectors in CMV's. Contemporaneous studies commissioned by the National Highway Traffic Safety Administration (NHTSA) to address the "Impact of Radar Detectors on Highway Traffic Safety," (R.15, 1988, D.O.T. 45807518), had concluded that the influence of detectors, if any, "on the overall traffic stream is slight," and that the cost of further studies on the subject was not warranted by the "magnitude of the potential negative effect of detectors on traffic safety." (Id. at 38-40). (R.6, Preliminary Regulatory Evaluation at p. B-1). FHWA took no action on the 1990 petition.

In its May, 1991 report regarding "Commercial Motor Vehicle Speed Control Devices," NHTSA rejected the argument that radar detectors use in CMV's required the regulation of the speeds traveled by heavy trucks. NHTSA concluded that, "[A]lthough a larger percentage of heavy trucks are equipped with radar detectors," the imposition of

federally mandated speed control devices on heavy trucks was not justified because the "potential effectiveness" of mandatory speed limitation in terms of either "crash reduction" or lives saved was "questionable." (R.16, Report p. 2-1). Consistent with this judgment, FHWA and NHTSA concluded, after an exhaustive review of traffic safety studies, in their January, 1991, Working Group Study, "Report on Speed," that:

> Recent studies have indicated that vehicles equipped with radar detectors generally travel at speeds higher than those not equipped with radar detectors. However, no studies have established a correlation between radar detector use and the actual risk of crashes (NHTSA] FHWA/p.63] "Without any conclusive evidence that radar detectors have a negative effect on highway Safety, States would best be served if left to make their own decision on whether or not to ban such devices." [NHTSA/FHWA, p. 54] (Preliminary Regulatory Evaluation R.6, p.B-1).

By a rider adopted to the 1992 DOT Appropriations Act, controlling the budget of the FHWA, the Senate Committee on Appropriations directed FHWA to reverse its field and issue a notice of proposed rulemaking (NPRM) "to prohibit the use of radar detectors in operating commercial motor vehicles." § 342 of Public Law 102-143 (signed October 28, 1991) provided:

> The Secretary of Transportation shall publish by January 15, 1992, a notice of proposed rulemaking with regard to amending the Federal Motor Carrier Safety Regulations to

> prohibit the use of radar detectors in operating commercial vehicles. Such notice shall solicit testimony regarding the safety, economic and operational aspects of prohibiting radar detectors in commercial operations. (A-81, R.1, p.1)

FHWA complied. By its NPRM, published on January 24, 1992, FHWA initiated the rulemaking here at issue to fulfill "the Congressional mandate in § 342 of the Department of Transportation and Related Agencies Appropriations Act," (A-51, R.3, Federal Register, Advanced Notice of Proposed rulemaking, 57 Fed. Reg. 2885, January 24, 1992).

The comment period in response to the NPRM closed May 26, 1992. FHWA took no action on the rulemaking for the next eighteen months. In April, 1993, more than a year after the close of the comment period, FHWA testified before Congress that the data presented neither established a "direct link" between radar detector use and CMV accidents, nor did it establish a "clear relationship" between the radar detector bans already in effect and "enhanced commercial motor vehicle safety." (A-93-94, D.O.T. and Related Agencies Appropriations for 1994; hearings before the Subcommittee of the Committee on Appropriations, House of Representatives, 103d Congress, First Session, p.598).

In September 1993, the Senate Committee on Appropriations, acknowledged that the "FHWA has indicated that there is inadequate information on the role of detectors in crashes involving commercial motor vehicles," (A-90, S. Report 103-150, Accompanying H.R. 2750- (emphasis supplied) and directed that FHWA conduct the studies required to obtain that information:

"The FHWA has indicated that there is inadequate information on the role of radar detectors in crashes involving commercial motor vehicles. Although accident causation is difficult to determine, it would be worthwhile to obtain quantitative data to determine whether commercial motor vehicles with radar detectors are overrepresented in crashes that involve speeding by operators of commercial motor vehicles." (Emphasis supplied). (A-90, S.Rept. 103-150, p. 109-110).

To this end the Committee directed FHWA:

" . . . to conduct a study indicating the presence, or lack thereof , of radar detectors in commercial vehicles that were involved in crashes in which commercial vehicles were believed to have been or were charged with exceeding the posted speed limit. Also FHWA should also determine the presence or lack thereof of radar detectors in commercial motor vehicles. A comparison of these two populations should be used to determine whether commercial motor vehicles with detectors are overrepresented in crashes that involve speed.

The analysis must meet strict criteria for reliability so that its results are not suspect." Id.

Nevertheless, once again, the Committee on Appropriations directed FHWA to ban detectors despite the

lack of technical justification for that action, stating that the Committee was:

> "...displeased that the FHWA has not moved forward with rulemaking that would ban radar detectors in commercial motor vehicles."[6] (A-90).

The message was not lost on FHWA. After sixteen months of inaction based upon its own review, and without performing the study required to enable FHWA to make a valid assessment of the safety justification for banning radar detectors in CMV's, FHWA forwarded the proposed rule to OMB on October 8, 1993 -- one week after the Appropriations committee expressed it "displeasure."

On December 14, 1991, FHWA issued its rule amending 49 C.F.R. Parts 390 and 392 (A-51-68) to ban the use of radar detectors in all CMV's. That rule added § 392.71 to provide:

> "(a) No driver shall use a radar detector in a commercial motor vehicle, or operate a commercial motor vehicle that is equipped with or contains any radar detector.
>
> (b) No motor carrier shall require or permit a driver to violate paragraph (a) of this section."

---

[6] The Committee directed the FHWA Administrator to inform the Committee "as soon as possible on the future direction that the agency will pursue regarding this matter." (A-91,S. Report 103-150, accompanying H.R.2750.)

REASONS FOR GRANTING THE WRIT

1. THIS CASE PRESENTS IMPORTANT QUESTIONS REGARDING THE SEPARATION OF CONGRESSIONAL AND EXECUTIVE POWERS WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT. FHWA'S PROFESSIONAL JUDGMENT WAS CLEAR THAT THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT A RADAR DETECTOR BAN. BASED UPON ITS REVIEW OF TRAFFIC SAFETY DATA, FHWA INTERPRETED THE EXECUTIVE ORDER CONTROLLING ITS ACTIONS TO REQUIRE THAT NO RULE ISSUE. WITHOUT THE INTRODUCTION OF LEGISLATION SEEKING TO AMEND OR REVISE THE MOTOR CARRIER SAFETY ACT OR TO PROHIBIT RADAR DETECTORS IN COMMERCIAL MOTOR VEHICLES AND WITHOUT THE BENEFIT OF CONGRESSIONAL HEARINGS ADDRESSED TO THE SUBSTANCE OF A RADAR DETECTOR BAN, CONGRESS USURPED FHWA'S EXECUTIVE FUNCTION BY ENACTMENT OF A RIDER TO THE 1992 DEPARTMENT OF TRANSPORTATION APPROPRIATIONS ACT REQUIRING FHWA TO REVERSE ITS PROFESSIONAL JUDGMENT AND TO COMMENCE RULEMAKING TO BAN RADAR DETECTORS IN CMV'S.

A. SEPARATION OF POWERS

By a rider adopted to the 1992 DOT Appropriations Act, controlling the budget of the FHWA, the Senate Committee on Appropriations directed FHWA to reverse its field and issue a notice of proposed rulemaking (NPRM)

"to prohibit the use of radar detectors in operating commercial motor vehicles."

FHWA on two occasions immediately prior to undertaking this rulemaking determined that no rulemaking should be commenced. FHWA twice concluded, pursuant to the Executive Order 12612 that no "problem" which was "national in scope" had been presented by the use of radar detectors in CMVs, (denial of 1988 Petition; Report on Speed, R.36). FHWA reviewed all traffic safety studies directed to the issue, found the data to be inconclusive, and concluded that the states "would be best served," if left to make their own decisions regarding radar detector use, (R.36).

FHWA does not even pretend that intervening reports or subsequent analysis affected its judgment regarding its decision to commence the rulemaking process. FHWA simply "turned on a dime" at the will of the Senate Committee on Appropriations.

In its Notice of Proposed Rulemaking (NPRM) FHWA noted:

> Public Law 102-143 specifically directs the Department of Transportation to issue this proposal. The Senate Committee report on Public Law 102-143 stated that, "while the general prohibition of radar detectors is properly left to the States, the use of radar detectors in vehicles in interstate commerce is an appropriate area for the Federal Government to regulate[7]. Federal Register, Vol 57. No. 16 (January 24, 1992) at p.2887 (Emphasis added) (A-59).

---

[7] Senate Report Number 102-148, 102d Congress, First Session, page 90 (1991) (footnote in original).

FHWA, thus reversed both its professional judgment that traffic safety data did not present a problem "national in scope," and it's interpretation of Executive Order 12621:

> It is certified that the policies contained in this document have been assessed in light of the principles, criteria, and requirements of the Federalism Executive Order. Because this notice is being issued in response to a statutory mandate, the FHWA has determined that this action accords fully with the Federalism Executive Order. (Emphasis supplied.) (A-60).

The Sixth Circuit concluded that Congress did not order FHWA to ban detectors and therefore rejected, without further comment, the argument that the rider to the appropriations act violated the separation of powers required between the executive and legislative branches of federal government. The Sixth Circuit's entire comment with regard to separation of powers is:

> Therefore, Congress did not force the agency to consider factors outside of those in the 1984 Safety Act but simply directed that a rulemaking be undertaken pursuant to, an in accordance with the rulemaking provisions of the 1984 safety act. Thus, we also reject petitioner's argument that by ordering the agency to ban radar detectors in CMV's Congress violated the principles of separation of powers. See Metropolitan Washington Airport Auth. v. Citizens for Abatement of Aircraft Noise, Inc., 501 U.S. 252, 111 S.Ct. 2298, 115 L.Ed.2d 236 (1991). (A-25, 47 F.3d. at 807).

The analysis does not address the problem. FHWA's determination not to issue the rulemaking was a substantive judgment, based upon its evaluation of all available traffic safety data. Indeed as noted by both FHWA and NTHSA in their "Report on Speed" issued in January, 1991 only 10 months before the enactment of § 342:

> Without any conclusive evidence that radar detectors have a negative effect on highway safety, States would be best served if left to make their own decision on whether or not to ban such devices. [NHTSA/FHWA, p. 54.] (R.6, Preliminary Regulatory Evaluation, supra. p. B-1).

On its face, §342 flatly reverses both FHWA's professional judgment and its interpretation of the Executive Order.

The "ultimate purpose of ... separation of powers is to protect the liberty and security of the governed." Metropolitan Washington Airport Auth. v. Citizens for Abatement of Aircraft Noise, Inc., 501 U.S. 252, 111 S.Ct. 2298, 115 L.Ed.2d 236, 256 (1991). Congress may not "invest itself or its Members with executive powers." Id. 115 L.Ed. at 257. While Congress might "enact general standards and assign to the Executive Branch the responsibility for making necessary managerial decisions in conformance with those standards:"

> If the power is executive, the Constitution does not permit an agent of Congress to exercise it. If the powers is legislative, Congress must exercise it in conformity with the bicameralism and presentment requirements of Art I, §7. In short, when Congress "[takes action] that ha[s] the

> purpose and effect of altering the legal rights, duties, and relations of persons ... outside the Legislative Branch", it must take that action by the procedures authorized in the Constitution. See, Chada, 462 U.S., at 952-955, 77 L.Ed. 2d. 317, 103 S.Ct. 2764[8]. Id. 115 L.Ed. at 257.

Congress did not act to define or amend the Motor Carrier Safety Act (MCSA). It did not adjust the federal-state relationship by declaring detectors to be inimical to the free flow of interstate commerce through legislation banning their use in CMV's, but rather ordered FHWA to take executive administrative action through a rider to the D.O.T. Appropriations bill. FHWA was then pressured through the subsequent actions of the Senate Committee on Appropriations, which controlled its budget, to proceed with the rulemaking.

The process was perverted. The "federal political process" designed to ensure the proper balance of federal and state prerogatives under the Commerce Clause, the 10th Amendment to the United States Constitution, and the MCSA itself, failed to protect the "liberty and security of the governed," violated state autonomy, and conflicted with MCSA. Reversal of the rule is required to effect a remedy "tailored to compensate for possible failings in the national political process." Garcia v. San Antonio Metro, 469 US 528, 105 S.Ct. 1005, 836 L.Ed. 2d 1016 (1985).

The FHWA notice of proposed rulemaking to ban detectors acknowledges the direction which it received, and concluded that given Congressional direction, the rulemaking must proceed. The NPRM itself acknowledged the lack of technical justification for the rule.

---

[8] INS v. Chada, 462 U.S. 919, 103 S.Ct. 2764 77 L.Ed. 2d. 317 (1983).

Moreover, it is "Alice in Wonderland" to conclude that FHWA was not "ordered" to ban use of detectors in CMV's, (A-25) 47 F.3d at 807. Having been told by the Senate Committee controlling its budget to issue a rule which it had twice determined was not justified, FHWA's direction was clear and the outcome of the rulemaking was preordained.

B. THE RULE WAS THE RESULT OF IMPROPER CONGRESSIONAL PRESSURE

The Sixth Circuit devoted most of it's analysis with regard to the issue of improper Congressional pressure to cases decided on grounds other than separation of powers (A.23-27, 47 F.3d 806-808).

The cases on which the Sixth Circuit relied hold that improper Congressional pressure may be a violation of the substantive enabling statute, the Administrative Procedure Act, or amount to a violation of due process:

> Before an administrative rulemaking may be overturned on the grounds of Congressional pressure, two conditions must be met. "First, the content of the pressure upon the Secretary [must be] designed to force him to decide upon factors not made relevant by Congress in the applicable statue ... Second, the Secretary's determination must be affected by those extraneous considerations". Sierra Club v. Costle, 657 F.2d 298, 409 (D.C. Cir. 1981) (citing, D.C. Fed'n of Civic Ass'ns v. Vople, 459 F.2d 1231 (D.C. Cir. 1971), cert. denied, 405 U.S. 1030, 92 S.Ct. 1290, 31 L.Ed.2d 489 (1972); Peter kiewit Sons' Co. v. United States Army Corps of Eng'rs, 714 F.2d 163, 169-70 (D.C.

Cir.1983); Town of Orangetown v. Ruckelshaus, 740 F.2d 185, 188 (2d. Cir. 984); Citizens Comm. Against Interstate Route 675 v. Lewis, 542 F.Supp. 496, 579 (S.D. Ohio 1982). (A-25-26, 47 F.3d at 807).

As the Court noted in D.C. Federation, 459 F.2d at 1246-47 (emphasis added), in striking Department of Transportation action because of "pressures emanating" from a member of Congress:

> . . . the decision would be invalid if based in whole or in part on the pressures emanating from Representative Natcher. Judge Fahy agrees, and we therefore hold, that on remand the Secretary must make new determinations based strictly on the merits and completely without regard to any considerations not made relevant by Congress in the applicable statutes . . .
>
> * * *
>
> If, in the course of reaching his decision, Secretary Volpe took into account "considerations that Congress could not have intended to make relevant," his action proceeded from an erroneous premise and his decision cannot stand. The error would be more flagrant, of course, if the Secretary had based his decision solely on the pressures generated by Representative Natcher. But it should be clear that his action would not be immunized merely because he also considered some relevant factors."

The Sixth Circuit determined that congress "merely directed the agency to publish a notice of proposed rulemaking in order to 'solicit testimony regarding the safety, economic, and operational aspects of prohibiting radar detectors in commercial operations' " and that "the Congressional remarks made by the 1993 Senate Appropriations Act did not direct the agency to adopt a ban." (A-25-26, 47 F.3d at 807).

However, it is clear from the history of the rule, and the NPRM itself, that the decision to initiate the rulemaking was "based in whole" upon §342 and that the outcome of the process was tainted by "pressure emanating" from the Senate Committee on Appropriations.

Nor is there any provision of the MSCA, authorizing Congress to direct FHWA to institute rulemaking which it had determined does not address a problem of national scope. To the contrary the MSCA specifically proscribed the unnecessary preemption of state laws, 49 U.S.C. App. §2505(c), in this case the judgment of forty state legislatures which have specifically rejected detector bans.

Congress had the opportunity to amend the Motor Carrier Safety Act to ban radar detectors, but chose not to do so on several occasions. FHWA was empowered to exercise professional judgment under the MSCA to enact a ban if it determined that it was justified, and was consistent with the dictates of federalism set forth in Executive Order 12621. FHWA, based on its professional judgment on two ocassions refused to enact such a ban. However, "displeased" the Senate Committee on Appropriations may have been with FHWA's professional judgment, it was not free to "order" FHWA to reverse its course through the enactment of the rider in question and to thereafter pressure FHWA during the rulemaking process to issue the rule.

2. THE RIDER TO THE 1992 DEPARTMENT OF TRANSPORTATION APPROPRIATIONS ACT IGNORED MANDATED EVALUATION OF COSTS TO THE 50 STATES WHICH RESULTED IN AN UNFUNDED ADMINISTRATIVE MANDATE TO THE 50 STATES WHICH CONGRESS PREVIOUSLY REFUSED TO ENACT

As noted by the rule itself, FHWA was required to assess the cost of the proposed rule. 49 U.S.C. §3102 provides in pertinent part:

> (d) Before prescribing or revising any requirement under this section, the Secretary shall consider the costs and benefits of such requirement.

Although the statement offered by FHWA in support of the rule purports to assess these costs, it is incomplete, without a factual basis, and in violation of the law. See e.g., Appalachian Power Co. v. Train, 545 F.2d, 1351 (4th Cir. 1976); Hooker Chemicals & Plastics, v. Train; 537 F.2d 629, 642 (2d Cir 1976)[9]. While evidence in the record was presented that the cost of enforcement of the rule to the average state would run 2,000,000 per year, no evaluation of the cost of enforcement to the states is offered by FHWA. Given that the FHWA here attempts a nationwide ban which must be enforced by the states to be effective, including 47 states which have not seen fit to ban detector use and 40 states which have rejected attempts to do so, it cannot be concluded that FHWA has complied with this statutory limitation on its regulatory authority, by ignoring the cost of enforcement to the states.

---

[9] For this reason the rule is also arbitrary and capricious.

The Sixth Circuit held that the failure of the FHWA to determine the costs to the states was of no consequence (A-22, 47 F.3d 806). However, this is clearly an unfunded mandate since there are no real federal law enforcement agencies who would enforce the detector ban and enforcement would be left entirely to the States. Nor can it be claimed that a cost benefit analysis is not necessary because a state may choose not to enforce the ban. FHWA's failure to assess the cost of enforcement by the states violates both the cost-benefit requirement and the due respect for federalism required by both the Motor Carrier Safety Act and the executive order governing FHWA's actions.

FHWA's analysis was further flawed, in that FHWA "assumes," (R.7, Regulatory Evaluation at p. 10), a reduction in costs without providing any basis in fact for its "assumptions".

To support its conclusion, FHWA merely identifies the number and cost of injuries arising out of all CMV crashes and:

> " . . . assumed that all of the relevant injuries, those involving speeding and radar detectors would become less severe by one MAIS level. We also assumed that one-third of effected fatalities would instead be reduced to incapacitating injuries" (R.7, Regulatory Evaluation at p.10).

First, FHWA offers no basis for determining the number of "relevant injuries, those involving speeding and radar detectors." Without undertaking an analysis of the incidence of CMV crashes involving detector use, the risk

of accident cannot, and has not been determined[10]. Second, not one word is offered by FHWA to explain the facts upon which it based its "assumptions," e.g., that all relevant injuries "would be reduced by 1 mais level."[11] It is simply not credible to assert that a ban against detectors use in CMV's engaged in interstate commerce will save $68 million dollars per year.

---

[10] Without this analysis, there is no legitimate way of assessing any savings in cost to a detector ban. No one knows better than FHWA, that it cannot simply "assume" that detectors will be involved in a given number/percentage of CMV accidents. NHTSA recognized as much in its study on Commercial Motor Vehicles speed control devices; and FHWA concluded that it had "inadequate information" on the role of detectors in CMV crashes.

[11] The studies relied upon by FHWA show that most trucks with detectors travel with the flow of traffic, where no slowing, and therefore no savings at all may be expected to occur as a result of the enforcement of the rule. Similarly, the studies relied upon by FHWA in enacting the ban rely on a purported correlation of detector use and high speeds; most heavy truck crashes, however do not occur on roadways where these very high travel speeds are prevalent.

Less than 1% of total fatal crash involvements of all heavy trucks occur at these speeds. Combination-unit truck fatal crash involvements in excess of 70 mph represent only about 1 of every 800 combination unit truck involvements at all speeds. There are only an estimated 30 fatal crash involvements annually involving combination unit trucks at speeds in excess of 70 mph. (R.16 Commercial Motor Vehicle Speed Control Devices, at ES-1, 3-5, 3-10, 3-12, 3-14).

FHWA could have assessed the cost of enforcement to the fifty (50) states, upon which the efficacy of the ban purportedly depends, but failed to do so.

3. THE SIXTH CIRCUIT DEPARTED FROM THE USUAL COURSE OF JUDICIAL PROCEEDING IN FINDING THAT THE RADAR DETECTOR BAN WAS NOT ARBITRARY AND CAPRICIOUS

Rulemaking which exceeds statutory authority, or fails to take into account all relevant considerations, is arbitrary and capricious. See e.g., Motor Vehicle Manufacturer's v. State Farm Mutual, 463 U.S. 29 103 S.Ct. 2856, 77 L.Ed. 2d 443 (1983); Public Citizens Health Research Group v. Tyson, 796 F.2d 1479, 1507 (D.C. Cir 1986). Ladies Garment Workers v Donovan, 722 F.2d 795, 822-26 (D.C. Cir. 1983); Action on Smoking and Health v. CAB, 699 F.2d 1209, 1217 (D.C.Cir. 1983), Ritter Transport v. ICC, 684 F.2d 86, 88 (D.C.Cir. 1982). Rodway v. USDA, 514 F.2d 809, 817 (D.C. Cir 1975). A rule which fails to consider an important aspect of the problem at issue must be reversed. See e.g., State Farm, supra. at 43; Public Citizens, supra. at 1507. Further, an agency must respond in a "reasoned" manner to "explain how the agency resolved any significant problems raised by the comments and to show how that resolution led the agency to the ultimate rule." State Farm, supra; Rodway, supra at 817; See also, Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 1375; Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 612 (2d. Cir. 1965). Such action is "inextricably intertwined" with the requirement that the agency solicit comments in the first instance. See e.g., Rodway, supra at 817. The agency must "set forth with clarity the ground for its rejection of opposing views," International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 651 (D.C. Cir. 1973) (Bazelon,

J. concurring). Moreover an agency must offer a reasoned analysis supporting its change in position State Farm supra. at 57; Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (1970) and provide a principled explanation for its change in direction. See e.g., State Farm and Greater Boston supra.; National Black Media Coalition v. FCC, 775 F.2d 342, 355 (D.C. Cir. 1985).

In this case, FHWA prohibited the use of radar detectors in CMV's without finding, or rendering any professional judgment, that detector use causes or contributes to the occurrence of CMV accidents. The determination of whether their is a "correlation between radar detector use and the actual risk of crashes," is the key issue. (FHWA/NHTSA Working Group Study p.54, 63; preliminary regulatory evaluation R.6, at B-1).

The rule is further arbitrary and capricious, in that it fails to assess the impact upon traffic safety of banning detector use in only one class of vehicles-CMV's-while leaving passenger and other vehicles unregulated. FHWA acknowledges the fact that studies by "FHWA and other groups over the last 25 years," (Preliminary Regulatory Evaluation, R.6, at B-6) demonstrate that an increase in the variance of speed between the slowest and fastest vehicles in a traffic stream increases the risk of accident, yet it did not consider, and renders no professional judgment whatsoever on the effect which its rule will have on speed variance of vehicles within the traffic stream and the occurrence of CMV accidents[12].

---

[12] If the rule serves the purpose intended, it may be expected to increase the risk of CMV crashes by creating a greater disparity in speed between trucks subject to the ban, and passenger vehicles and trucks not subject to regulation, by purportedly reducing the travel speed of some trucks while leaving the speed of passenger and other vehicles unaffected.

The rule is further vulnerable, because there is no evidence in the record that any group of CMV drivers select higher speeds because they operate detectors.

FHWA has "failed entirely to consider an -- important aspect of the problem," State Farm, supra, the crucial relation of detector use and its proposed action to the risk of CMV accidents.

It is clear FHWA failed to consider "all relevant factors" and "relevant evidence" presented by the record, State Farm, supra. FHWA neither "explained how the agency resolved significant problems" raised by appellants comments, nor did it "set forth with clarity," or otherwise, the "ground for its rejection of opposing views." Rodway and International Harvester.

Without making any determination whatsoever that CMV use has an effect on the occurrence of CMV accidents, without any evidence of bans being effective to reduce traffic speeds or accident risk or severity, without considering the low incidence of accidents in heavy trucks- the class of CMV's with the highest detector use, and without any evidence that detector use cause CMV crashes or higher speeds, FHWA has created a rule banning radar detectors in only one class of vehicles, CMV's, thereby increasing the variance in speeds between passenger vehicles and CMV's and threatening to cause , according to established highway traffic analysis, a greater risk of CMV accidents.

CONCLUSION

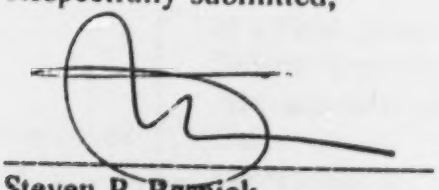
FHWA reversed its prior position that no rulemaking banning detectors should commence in response to the directive of the congressional committee with jurisdiction over its budget, set forth in §342. It commenced rulemaking solely because the rider attached to the Appropriations Act controlling its budget directed it to do

so. It proceeded to ban detectors in response to pressure from the Senate Committee on Appropriations.

In so doing Congress usurped the executive function and caused the FHWA, without considering important aspects of the problem and without conducting the required cost benefit analysis, to improperly alter the relationship between the States and the Federal Government and impose an unfunded administrative mandate on the States, by enacting a rule banning the use of radar detectors in CMVs.

The issues presented should be reviewed and the rulemaking should be reversed.

Respectfully submitted,



Steven P. Resnick
116-D Cathedral Street
Annapolis, Maryland 21401
(410)267-8400

Counsel for Petitioners, RADAR and
Frank Figuero

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1995 FED App. 0059P (6th Cir.)
File Name: 95a0059p.06

No. 94-3140

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RADIO ASSOCIATION ON DEFENDING AIRWAVE RIGHTS, INC.; FRANK FIGUERO,
Petitioners,

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION, FEDERAL HIGHWAY ADMINISTRATION,
Respondent.

ON PETITION for Review of a Final Order of the Federal Highway Administration of the United States Department of Transportation

---

Decided and Filed February 17, 1995

Before: JONES and MILBURN, Circuit Judges; and COHN,* District Judge.

---

*The Honorable Avern Cohn, United States District Judge for the Eastern District of Michigan, sitting by designation.

MILBURN, Circuit Judge. Petitioners Radio Association on Defending Airwave Rights, Inc. (RADAR) and Frank Figuero, a commercial motor vehicle operator, petition this Court to review, enjoin, and set aside a regulation of the Federal Highway Administration prohibiting the use of radar detectors in commercial motor vehicles. On petition for review, the issues are: (1) whether the agency arbitrarily and capriciously promulgated the rulemaking, based on evidence in the administrative record, (2) whether the agency failed to adequately conduct a cost assessment of the rulemaking, (3) whether the agency was improperly influenced by Congressional pressure in rendering its decision to promulgate the rulemaking, and (4) whether the rulemaking violates equal protection guarantees of the Fifth Amendment to the Constitution of the United States by prohibiting only the use of radar detectors in commercial motor vehicles while leaving other vehicles unregulated. For the reasons that follow, the petition for review is denied.

I.

A. Regulatory Authority of the Federal Highway Administration

Congress first authorized federal regulation of motor carrier vehicles in the Motor Carrier Act of 1935, ch. 498, Part II, § 204(a), 49 Stat. 543, 546-47 ("the 1935 Act"). Subsequently, Congress enacted the Motor Carrier Safety Act of 1984, which ratified the regulations adopted under the authority of the 1935 Act and required the Secretary of Transportation ("the Secretary") to issue updated or more stringent rules. Motor Carrier Safety Act of 1984, Pub. L. 98-544, 98 Stat. 2832 (1984) ("1984 Safety Act").[1] The

---

[1]The 1984 Safety Act was recodified at 49 U.S.C. § 31,131 *et seq.* by Pub. L. No. 103-272 on July 5, 1994. 49 U.S.C. § 3102(b) of the 1935 Act, as amended, was also recodified by Pub. L. No. 103-272 at 49 U.S.C. § 31,502(b).

express purpose of the 1984 Safety Act was "to promote the safe operation of commercial motor vehicles . . . and to assure increased compliance with traffic laws and with the commercial motor vehicle safety and health rules, regulations, standards, and orders issued pursuant to this Act." 49 U.S.C. app. § 2501.

In the 1984 Safety Act, Congress made the following findings:

> (1) it is in the public interest to enhance commercial motor vehicle safety and thereby to reduce highway fatalities, injuries, and property damage;
> (2) improved, more uniform commercial motor vehicle safety measures and strengthened enforcement would reduce the number of fatalities and injuries and the level of property damage related to commercial motor vehicle operations;
> (3) enhanced protection of the health of commercial motor vehicle operators is in the public interest; and
> (4) interested State governments can provide valuable assistance to the Federal Government in assuring that commercial motor vehicle operations are conducted safely and healthfully.

49 U.S.C. app. § 2502.[2] Based on these findings, Congress authorized the Secretary to issue or reissue regulations pertaining to the safe operation of trucks including minimum standards to "ensure that . . . commercial motor vehicles are safely . . . operated." 49 U.S.C. app. § 2505(a)(1). The Secretary also has the authority to "prescribe requirements for . . . safety of operation . . . of motor carrier[s]" under the Motor Carrier

---

[2]Under the 1984 Safety Act, a commercial motor vehicle ("CMV") is defined as any vehicle with a gross vehicle weight rating in excess of 10,000 lbs., a bus capable of carrying 16 or more passengers, and vehicles carrying hazardous cargo in quantities requiring placarding. 49 U.S.C. app. § 2503(1).

Act of 1935, as amended, 49 U.S.C. § 3102(b). Regulatory authority under both statutes has been delegated to respondent, the Federal Highway Administration ("FHWA" or "the agency"). 49 U.S.C. § 104(c)(2); 49 C.F.R. 1.48(f), (aa).

B. Regulation of Radar Detectors

Radar detectors have been the subject of a great amount of controversy and proposed legislation.[3] In May 1988, a group of safety organizations, police agencies, and representatives of the insurance industry jointly filed a petition for rulemaking to ban the use of radar detectors in CMVs with the FHWA. The agency denied the petition on November 8, 1988, stating:

> It is our view that the enforcement of speed limit laws on the highways is a problem which is common to the States and not truly national in scope. As a common state problem, we believe that the States, acting either individually or together, can effectively deal with this matter.

November 8, 1988 letter from FHWA to group petitioning for rulemaking (quoted in Petitioners' Brief at 5). Thus, the agency concluded that a federal ban on radar detectors would violate principles of federalism. *Id.*

On July 18, 1990, a second petition was filed with the FHWA seeking a rulemaking to prohibit radar detectors in CMVs. The petition was filed jointly by Advocates for

---

[3] As petitioners note in their brief, Congress has repeatedly refused to enact bills prohibiting the use of radar detectors generally or to provide penalties for their manufacture, sale and use. *See, e.g.*, S. 1418, 103rd Cong., 1st Sess. (1993); H.R. 881, 102nd Cong., 1st Sess. (1991); H.R. 224, 101st Cong., 1st Sess. (1989); H.R. 2102, 101st Cong., 1st Sess. (1989). In addition, only three states currently ban radar detectors while forty states that have considered radar detector bans have rejected them. Petitioners' brief at 4.

Highway and Auto Safety, the American Automobile Association, the American Trucking Association, the Insurance Institute for Highway Safety, the International Association of Chiefs of Police, the National Association of Governors' Highway Safety Representatives, the National Safety Council, and Public Citizen. The petition cited studies that showed: (1) drivers of tractor-trailers were the most likely to use radar detectors, (2) drivers of tractor/semitrailers with radar detectors were two to three times more likely to speed than those without radar detectors, and (3) technology is now available to law enforcement authorities to detect the use of radar detectors.

Respondent FHWA had taken no action on the petition for rulemaking when Congress enacted the DOT Appropriations Act of 1992. This Act directed the Secretary to publish

> a notice of proposed rulemaking with regard to amending the Federal Motor Carrier Safety regulations to prohibit the use of radar detectors in operating commercial motor vehicles. Such notice shall solicit testimony regarding the safety, economic, and operational aspects of prohibiting radar detectors in commercial operations.

DOT Appropriations Act of 1992, Pub. L. No. 102-143, § 342 (1991). Accordingly, on January 24, 1992, FHWA published a notice of proposed rulemaking ("NPRM") to comply with the Congressional mandate to conduct a rulemaking proceeding and to respond to the 1990 petition for a rulemaking. 57 Fed. Reg. 2885 (1992). In the NPRM, the agency acknowledged that the public held "widely divergent views on the rationale for, and efficacy of, banning radar detectors from CMVs," and that "scientific proof establishing a direct causative linkage between radar detector use and CMV accidents may not exist." *Id.* Furthermore, the agency stated in the NPRM that although it denied a similar petition in 1988 on grounds of federalism, the agency has the statutory

authority to promulgate such a regulation. Specifically, the agency stated that while it continued to believe that enforcement of speed limit laws was better left to the states, the

> authority for the proposed ban on radar detector use and possession under 49 CFR part 392 is inherent in the broad, long-standing powers conferred on the Secretary to regulate the *safety* on [sic] interstate motor carriers of passengers and property under Title 49 of the United States Code. In particular, the Motor Carrier Safety Act of 1984 (1984 Act) (Pub. L. 98-554, 98 Stat. 2832) provides ample authority for this proposed rulemaking. In addition, Public Law 102-143 specifically directs the Department of Transportation to issue this proposal. The Senate Committee report on Public Law 102-143 stated that, "while the general prohibition of radar detectors is properly left to the States, the use of radar detectors in vehicles in interstate commerce is an appropriate arena for the Federal Government to regulate."[4]

Id. at 2887 (Emphasis added). However, the agency requested comments on whether a decision to ban radar detectors is more appropriately left to the states. *Id.*

In addition, FHWA prepared a Preliminary Regulatory Evaluation of the proposed ban which summarized data relating to the correlation between radar detector use and speeding, and between speeding and accidents. The preliminary evaluation concluded that no direct link between radar detectors and CMV accidents had been proven at that time nor had a clear relationship between radar detector bans and enhanced CMV safety been established. Thus, the agency determined that a chain of inference was required to assess the effects of radar

---

[4]Senate Report Number 102-148, 102d Congress First Session, page 90 (1991).

detector use on highway safety. The agency described the chain as follows:

> (a) Radar detectors lead to an increased incidence of speeding;
> (b) More speeding results in more accidents, and in accidents of greater severity.

Id. The agency also noted that evidence exists to show that radar detector users have a higher propensity to speed than nonusers. Finally, the agency stated that traffic engineering literature was not clear as to whether speeding causes accidents. While some studies suggest that increased speed alone leads to more accidents, other studies indicate that variance in speed relates more directly to accident incidence than does speeding per se. However, the agency also noted that the literature indicates that once a crash occurs, injury severity increases as speed increases. *Id.*

FHWA received 26,454 comments in response to the NPRM.[5] These comments reflected widely divergent views on the desirability of the proposed ban. Comments in support of the ban were received from 24 state transportation and motor vehicle departments, 442 police agencies, 50 safety interest groups, several trucking and motorcoach associations, the insurance industry, commercial and public interest organizations specializing in highway safety matters, health professionals, and the general public. These comments stated that the only use of radar detectors is to violate the speed limit laws without detection; that drivers are more likely to speed when using a radar detector; that police agencies have the technology to enforce a radar detector ban; that a positive correlation exists between radar detector use and speeding, and between speeding and accidents; and that the larger weight

[5]The comment period closed May 26, 1992.

of CMVs causes greater severity of accidents when these vehicles are involved in accidents while speeding.

Comments were also received from CMV operators and the radar detector industry in opposition to the proposed ban. These comments stated that radar detectors are necessary to protect drivers from faulty police speed detection devices; that a federal radar ban would infringe upon states' rights; and that a radar detector ban would impermissibly restrict CMV operators' liberty. In addition, petitioner RADAR included with its comment an independent evaluation of the statistical justification of the proposed regulation conducted by the Texas Research and Development Foundation ("TRDF"). The TRDF study concluded that the proposed ban would not increase highway safety because no evidence reflected a correlation between radar detector use and the occurrence or severity of CMV accidents. The TRDF study concluded that speed variance was the cause of most accidents.

In April 1993, FHWA testified before Congress that the agency was unable to establish a direct link between radar detector use and CMV accidents, nor could it establish a clear relationship between radar detector bans already in effect and enhanced CMV safety. Nevertheless, in August 1993, the agency prepared its "Regulatory Evaluation to Accompany Final Rule: Radar Detectors in Commercial Motor Vehicles." This regulatory evaluation concluded that radar detector regulation will lead to a reduction in speed, which will lead to a reduction in the severity of accidents. Thus, the regulatory evaluation found that the agency should promulgate the rulemaking. The agency had still not taken any action on the rulemaking when the Senate Appropriations Committee Report was published in September 1993. In that report, the Committee stated:

> The FHWA has indicated that there is inadequate information on the role of radar detectors in crashes involving commercial motor vehicles. Although accident causation is difficult to determine, it would be

> worthwhile to obtain quantitative data to determine whether commercial motor vehicles with radar detectors are overrepresented in crashes that involve speeding by operators of commercial motor vehicles. To this end, the Committee directs the FHWA . . . to conduct a study indicating the presence, or lack thereof, of radar detectors in commercial vehicles involved in crashes in which commercial vehicles were believed to have been or were charged with exceeding the posted speed limit. Also, FHWA should also determine the presence, or lack thereof, of radar detectors in the population of commercial motor vehicles. A comparison of these two proportions should be used to determine whether commercial motor vehicles with radar detectors are overrepresented in crashes that involve speeding.
>
> . . .
>
> The Committee is displeased that the FHWA has not moved forward with the rulemaking that would ban radar detectors in commercial motor vehicles. The Committee directs that the Administrator and the Associate Administrator inform the Committee as soon as possible on the future direction that the Agency will pursue regarding this matter.

Senate Appropriations Committee Report, S. Rep. No. 150, 103d Cong., 1st Sess. 111-12 (1993). The agency subsequently forwarded its proposed rule to the OMB on October 8, 1993 without conducting any further studies regarding the correlation between radar detector use in CMVs and traffic safety.

On December 14, 1993, FHWA issued a final rule amending 49 C.F.R. Parts 390 and 392 to ban the use of radar detectors in CMVs.[6] In the final rule, FHWA

---

[6] The rule added the following section to Part 392 – Driving of Motor Vehicles:
§ 392.71 Radar detectors; use and/or possession.

acknowledged that various groups hold widely divergent views on the rationale of banning the use of radar detectors in CMVs and that unequivocal scientific proof establishing a direct causative linkage between radar detector use and CMV accidents may not exist. Nevertheless, FHWA determined that "sufficient safety rationale and justification exist to support banning the use of radar detectors in CMVs . . ." J.A. 9. The agency based this conclusion on the information contained in the 1990 petition for rulemaking and the comments received in response to the NPRM.

The agency explained its reasoning for the final rule in its final regulatory evaluation which summarized data on the relationships between radar detector use and speeding, and between speeding and accident severity. FHWA predicted that the rule will result in a reduction in the speed of trucks which will lead to a decline in the severity of accidents. The agency further explained that for this result to transpire, the following conditions must be true.

(a) No driver shall use a radar detector in a commercial motor vehicle, or operate a commercial motor vehicle that is equipped with or contains any radar detector.

(b) No motor carrier shall require or permit a driver to violate paragraph (a) of this section.

The rule also added the following definition to § 390.5:

Radar detector means any device or mechanism to detect the emission of radio microwaves, laser beams or any other future speed measurement technology employed by enforcement personnel to measure the speed of commercial motor vehicles upon public roads and highways for enforcement purposes. Excluded from this definition are radar detection devices that meet both of the following requirements:

(1) Transported outside the driver's compartment of the vehicle. For this purpose, the *driver's compartment* of a passenger-carrying CMV shall include all space designed to accommodate both the driver and the passengers; and

(2) Completely inaccessible to, inoperable by, and imperceptible to the driver while operating the vehicle.

J.A. 6-7.

(1) Some truck drivers must be using radar detectors.
(2) These drivers must be travelling at higher speeds than drivers without radar detectors.
(3) These truck drivers must be in more severe accidents than trucks that are not speeding.
(4) The ban must cause a reduction in detector use.
(5) The reduction in detector use must lead to a decline in truck speeds.
(6) This reduction in speeds must result in a reduction of the severity of accidents.

J.A. 66. The agency cited studies which supported these presumptions.

Based on this logic, FHWA performed a cost-benefit analysis of the regulation.[7] The agency found that the primary benefit of the rule is a reduction in the severity of accidents. Thus, FHWA assumed that every injury that results from an accident involving a heavy vehicle with a radar detector, and in which speed is a factor, becomes less severe by one level of the Maximum Adjusted Injury Scale ("MAIS"), a coding scheme of the cost of accidents. Moreover, the agency assumed that one third of all fatalities will instead be incapacitating injuries. However, the agency did not assume the ban would result in a net reduction of accidents. In order to calculate the projected benefits of the regulation, the agency multiplied the number of CMV accidents in 1990 by an estimate of the percentage of these accidents in which speeding was a contributing factor. The agency then estimated the percentage of these accidents in which a radar detector was used. Finally, the agency reduced this total by one MAIS level and found that the ban would yield a benefit of $68 million.

---

[7] Both the Motor Carrier Safety Act of 1935, as amended, and the 1984 Safety Act require the agency to conduct a cost/benefit analysis prior to adoption of a rule. 49 U.S.C. § 3102(d); 49 U.S.C. app. § 2505(c)(2).

The agency determined that the cost of the ban is difficult to determine. The agency noted that manufacturers of radar detectors and some distributors would be negatively effected by the ban. The agency rejected petitioner RADAR's estimate of these costs finding that the ban does not prohibit the production of radar detectors, and manufacturers could continue to sell their products to automobile drivers and to export markets. Further, the agency found that the CMV market for radar detectors is dwarfed by the passenger car market for these devices. In addition, the agency concluded that radar detector manufacturers should have increased sales of radar detector detectors needed to enforce the ban. Therefore, the agency concluded that the benefits of the rule were 4.5 times greater than its costs.[8]

Finally, the agency analyzed the effects of the rule on the policy-making discretion of the states. FHWA concluded that "Consistent with federalism principles, the final rule provides for a Federal ban, but provides significant discretion for States in their enforcement." J.A. 28. The agency also acknowledged that the Senate Appropriations Committee directed FHWA to study the effects of radar detector use by CMVs on highway safety. In response, the agency stated that it "intends to carefully monitor the effects of the radar detector ban on CMV operations and safety." J.A. 9. This timely petition for review followed.

II.

A.

Petitioners argue that FWHA's rulemaking, which prohibits the use of radar detectors in CMVs, is arbitrary

---

[8]The agency also noted that unmeasured costs and benefits of the rule included a possible increase in the price of radar detectors for passenger cars and a reduction in fuel use as CMV speeds are reduced, respectively.

and capricious. The Administrative Procedure Act ("APA") sets the standard of review applied in cases of appeals from agency rulemaking. When reviewing a rulemaking, "We must uphold a rule unless it exceeds the authority vested in the agency by Congress or is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . .'" *National Truck Equip. Ass'n v. National Highway Traffic Safety Admin.*, 919 F.2d 1148, 1152-53 (6th Cir. 1990) (quoting 5 U.S.C. § 706(2)(A) (1988)). "In determining whether a decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law the reviewing court must consider 'whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'" *Simms v. National Highway Traffic Safety Admin.*, 1995 WL 17332, *4 (6th Cir., Jan. 19, 1995) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)). The Supreme Court has explained that the

> scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. . . . Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies; we may not supply a reasoned basis for the agency's action that the agency itself has not given.

Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). This court has cautioned that "Given the narrow scope of review permitted when a petitioner claims standards adopted by an agency are arbitrary and capricious, a reviewing court must

take care not to merely rubber stamp agency decisions. Rather the court must 'ensure that the agency took a "hard look" at all relevant issues and considered reasonable alternatives. . . .'" *Simms*, 1995 WL 17332 at *5 (quoting *Neighborhood TV Co. v. Federal Communications Comm'n*, 742 F.2d 629, 639 (D.C. Cir. 1984)).

Petitioners argue that the rulemaking is arbitrary and capricious for several reasons. Petitioners assert that the agency failed to make any showing that radar detectors cause or increase the risk of accidents involving CMVs; the agency failed to evaluate the effect of the rule on speed distribution in the overall traffic stream; the agency did not address the efficacy of the rule in light of CMV crash data regarding heavy trucks; the agency failed to show the rule's efficacy in light of evidence that state radar detector bans have not decreased radar detector usage; and the agency reversed its position on the appropriateness of a federal ban without explanation.

First, petitioners argue that the rulemaking exceeds its statutory authority because the agency did not find, or render any professional judgment, that radar detector use causes or contributes to the occurrence of CMV accidents. Specifically, petitioners assert that the 1984 Safety Act requires the agency to minimize "unnecessary pre-emption" of state laws. 49 U.S.C. app. § 2505(c)(2). Thus, petitioners argue that the agency's failure to make the threshold determination of whether detector use causes or contributes to CMV accidents causes the rule to exceed the agency's statutory authority. Petitioners cite *Industrial Union Dep't, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 613-15 (1980), for the proposition that the failure to make a factual determination that a rule is reasonably necessary causes the agency action to exceed its statutory authority.

In this case, FHWA promulgated the rulemaking at issue to bring CMV operators into compliance with States' posted speed limits and thereby minimize injuries when

highway collisions occur. Radar Detectors in Commercial Motor Vehicles, 58 Fed. Reg. 67370, 67371 (1993). FHWA has been granted very broad authority to promulgate regulations to ensure, among other things, that CMVs are safely operated. *See* 49 U.S.C. § 3102(b), 49 U.S.C. app. § 2505(a)(1). Moreover, the express purpose of the 1984 Safety Act is to "minimize dangers to the health of operators of commercial motor vehicles" and "to assure increased compliance with traffic laws." 49 U.S.C. app. § 2501. FHWA's rulemaking authority is not limited to measures that affect the occurrence of accidents, as petitioners argue. We find no support for petitioners' assumption that accident causation must be linked to radar detector use before FHWA could promulgate the rulemaking.[9]

Moreover, the administrative record shows that it was reasonable for the agency to conclude that a ban of radar detectors in CMVs would increase traffic safety. FHWA determined that radar detector users are more likely to speed than nonusers. In addition, the agency found that once a crash occurs, the severity of the accident increases as crash speed increases. Further, studies indicated that CMV operators were two to three times more likely to use radar detectors than other vehicle operators and that operators with these devices are more likely to speed than those without radar detectors. Therefore, we conclude that the agency did not exceed its statutory authority in promulgating the rulemaking without finding that radar detector use causes or contributes to the occurrence of CMV accidents.

---

[9]Petitioners argue that "the regulation also exceeds statutory authority, in that radar detectors, which are not part of safety or other CMV equipment, are not within the scope of regulatory authority given to FHWA by [the 1984 Safety Act]." Petitioners' brief at 25 n.8. However, the rule at issue is a safety "operation" standard for CMVs, which is expressly authorized by the 1984 Safety Act. *See* 49 U.S.C. app. § 2505(a)(1).

Second, petitioners argue that the rule is arbitrary and capricious because it fails to assess the impact on traffic safety of banning radar detector use in only one class of vehicles, i.e., CMVs, while leaving passenger and other vehicles unregulated. Petitioners assert that variance of traffic speed is the main cause of traffic accidents. Thus, by only banning radar detector use in CMVs, the rule will increase the disparity in the variance of traffic speed because unregulated cars will arguably still exceed the speed limit while CMVs will not speed without radar detectors. Petitioners conclude that by failing to study this dynamic, the agency has "entirely failed to consider an important aspect of the problem." *State Farm*, 463 U.S. at 43.

The agency argues that the rule is based on the premise that state speed limits constitute maximum safe speeds and that the ban would induce CMV operators to comply with those limits.[10] Furthermore, in its preliminary regulatory evaluation, the agency noted that while some traffic engineering studies indicate that variance in speed relates more directly to accident incidence than does speeding per se, other studies suggest that increased speed alone leads to more accidents. Thus, the effect of speed variance of the traffic stream is not clear. Therefore, we will not hold that the agency acted arbitrarily or capriciously in failing to monitor this effect. Moreover, the agency found that it was clear that once a crash occurs, injury severity increases as crash speed increases and thus, a reduction in speed causes a reduction in injury severity. Therefore, we conclude that the agency did not fail to consider an important aspect of the problem.

Third, petitioners argue that the rule is arbitrary and capricious because the agency failed to consider the

---

[10] The agency also argues that its regulatory authority under the 1984 Safety Act is limited to CMVs only and thus it was proper for the ban to apply only to CMVs.

efficacy of the rule in light of CMV crash data regarding heavy trucks. Specifically, petitioners argue that there is no evidence on the record that CMV operators speed because they operate radar detectors. Instead, petitioners assert that the record shows that some CMV drivers slow down when they receive a signal thus having a positive effect on traffic safety. Moreover, petitioners assert that the occurrence of accidents is extremely low in heavy trucks, where detector use is the highest and, therefore, radar detectors do not cause these users to be involved in more accidents. In addition, petitioners assert that radar detectors increase traffic safety by assisting CMV drivers to drive at the mean speed of traffic. Based on these arguments, petitioners assert that the agency did not consider all "relevant factors" and "relevant data" presented by the record. *State Farm*, 463 U.S. at 42-43.

The agency addressed petitioners' concerns in its regulatory evaluation of the final rule. The agency found that

> several studies document that drivers with radar detectors are more likely to speed than those without radar detectors, and they are likely to speed faster than non-radar equipped drivers. [The] . . . 7 State IIHS [Insurance Institute of Highway Safety] study showed that 28 percent of trucks with radar detectors were travelling faster than 65 MPH, while only 18% of trucks without [radar] detectors were travelling that fast. Six percent of detector equipped trucks were driving over 70 MPH, while only 3% of those without [radar] detectors were moving that fast. Another 1990 study by IIHS of radar detector use in Maryland and Virginia found similar results (Radar Detector Use and Speeds in Maryland and Virginia). That study reported that 35% of tractor trailers with radar detectors were travelling over 65 MPH, while only 15 % of those without radar detectors were travelling that fast. For speeds over 70 MPH, the comparable numbers are 7% and 2%, respectively.

J.A. 67. Thus, the administrative record supports the agency's finding that CMV operators with radar detectors are more likely to speed than non-users.[11]

Further, petitioners' argument that no evidence shows that the use of radar detectors causes CMV operators to be involved in more accidents is not relevant. As discussed above, the rulemaking is based on the presumption that radar detectors cause speeding, and speeding increases the severity of accidents when they occur. The rule does not purport to show a connection between radar detector use and accident occurrence. Finally, we find no merit in petitioners' argument that radar detectors increase traffic safety by assisting CMV operators to drive at the mean speed of traffic. The agency concluded that posted State speed limits are the maximum safe speed. Moreover, the agency presented evidence that accident severity increases as speed increases. Therefore, we conclude that the agency considered all relevant evidence presented by the record in its rulemaking process.

Fourth, petitioners argue that the agency failed to show the rule's efficacy in light of evidence that state radar detector bans have not decreased radar detector use. An agency rule is arbitrary and capricious if an agency "offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *State Farm*, 463 U.S. at 43.

In this case, the agency found that "One IIHS study showed that trucks in Virginia, where radar detectors are illegal, are more likely to possess [radar] detectors than are

---

[11]We note that petitioners argue above that banning the use of radar detectors in CMVs only would be unsafe because it would create a greater speed variance between regulated vehicles, i.e., CMVs, and unregulated vehicles. This argument contradicts petitioners' assertion that CMV operators with radar detectors are not more likely to speed than non-users.

trucks in Maryland, where detectors are not illegal . . . This suggests that there may be problems enforcing the ban." J.A. 68. However, the agency also found that a later study of states with radar detector bans showed a slight reduction in their use in those states. Finally, the agency stated that "We believe that the differences between State bans and a nationwide ban are differences of kind, not of degree." J.A. 68. The agency found that "Drivers with [radar] detectors now may be disinclined to remove them when travelling through the few States where they are illegal, as they can be used in the remaining 47 States." *Id.* We find that this explanation is not "so implausible that it could not be ascribed to a difference in view." *State Farm*, 463 U.S. at 43. Accordingly, we conclude that the rule is not arbitrary and capricious.

Finally, petitioners argue that the rulemaking is arbitrary and capricious because the agency reversed, without explanation, its repeated professional judgment that no rule banning radar detectors should issue. In *State Farm*, the Supreme Court held that "'An agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency . . . must supply a reasoned analysis . . .'" *State Farm*, 463 U.S. at 57 (quoting *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971)).

The agency explains that its previous reluctance to issue a rulemaking banning the use of radar detectors in CMVs was based on federalism concerns. The agency further argues that its belief that it needed evidence linking radar detector use to accident occurrence to promulgate the rulemaking was not based on doubts as to the positive safety effects of the ban, but on federalism grounds. Moreover, the agency argues that the comments received in response to the NPRM persuaded the agency that the safety problem presented by CMVs using radar detectors was national in scope and thus overcame the agency's previous federalism concerns. In the NPRM, the agency

stated that "If safety justification [for banning radar detectors] is established, the FHWA must also decide whether a decision to ban such equipment is more appropriate for individual States to make, and specifically seeks comments on this issue." 57 Fed. Reg. 2887 (1992). Moreover, in the preamble to its final rule, the agency concluded that "Based on comments received to the docket, . . . the FHWA believes that sufficient safety rationale and justification exist to support banning the use of radar detectors in CMVs . . ." Radar Detectors in Commercial Motor Vehicles, 58 Fed. Reg. 67370, 67371 (1993). Therefore, we conclude that the agency properly changed its view of its federalism concern regarding the ban based on a fuller understanding of the national scope of the safety issue presented by CMV use of radar detectors through comments received in the rulemaking process. Accordingly, we hold that the rule is not arbitrary and capricious.

B.

Petitioners argue that the rulemaking must be set aside because the agency failed to properly conduct a cost assessment of the proposed rule as required by 49 U.S.C. § 3102(d). Both the Motor Carrier Safety Act of 1935, as amended, and the 1984 Safety Act require the agency to conduct a cost-benefit analysis prior to adoption of a rule.[12] 49 U.S.C. § 3102(d); 49 U.S.C. app.

---

[12]As discussed earlier, the 1984 Safety Act gave the agency the authority to reissue regulations pertaining to truck safety. 49 U.S.C. § app. 2505(a)(1). The agency must conduct a cost-benefit analysis under this section pursuant to 49 U.S.C. app. § 2505(c)(2), which states in relevant part:

> Before issuing such regulations, the Secretary shall, *to the extent practicable* and consistent with the purposes of this Act, consider (A) costs and benefits . . . (Emphasis added).

§ 2505(c)(2). The agency included this analysis in its regulatory evaluation of its final rule. While petitioners concede that the agency did perform a cost assessment, they argue that the assessment is incomplete, without a factual basis, and in violation of the law. Petitioners put forth two reasons why the cost assessment is allegedly inadequate. First, petitioners argue that the cost assessment is incomplete because it fails to consider the costs that the states will incur in enforcing the ban. Second, petitioners argue that the cost analysis is flawed because it provides no factual basis for the number of accidents in which the radar detector ban will affect by reducing the number of fatalities and the severity of injuries. In addition, petitioners argue that the cost analysis does not provide an adequate factual basis for its assumption that a radar detector ban will reduce the severity of injuries in accidents involving CMVs.

Thus, we must determine if the cost assessment performed by the agency was arbitrary and capricious. *See Center for Auto Safety v. Peck*, 751 F.2d 1336, 1366 (D.C. Cir. 1985). The legislative history of the 1984 Safety Act, which established a cost-benefit analysis requirement under both the 1984 Safety Act, 49 U.S.C. app. § 2505(c)(2), and the 1935 Act, 49 U.S.C. § 3102(d), explains the purpose of this analysis as follows:

> In requiring the Secretary to consider costs and benefits, where practicable, in the course of regulatory activities, the Committee realizes that many aspects of safety and health regulation do not lend themselves to

---

The 1935 Act, as amended, also gave the agency the authority to regulate truck safety. 49 U.S.C § 3102(b). The 1984 Safety Act added 49 U.S.C. § 3102(d), which also required the agency to conduct a cost-benefit analysis, stating:

> Before prescribing or revising any requirement under this section, the Secretary shall consider the costs and benefits of such requirement.

> detailed cost-benefit analysis. However, the Committee intends that DOT, in issuing a regulation, will perform *some type* of cost-benefit analysis, recognizing that while the benefits of a particular rule or regulation may be substantial, they may not be quantifiable. *Additionally, the Committee does not intend such requirement to have the effect of precluding, preventing, or suspending the promulgation or revision of rules, regulations, standards, or orders due to difficulty in establishing specific, quantified cost or benefit data.*

S. Rep. No. 98-554, 98th Cong., 2d Sess. 8 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4792. (Emphasis added).

The agency argues that it was under no obligation to include the cost of enforcement the states will incur in its cost analysis of the ban. The agency bases this argument on the premise that until a state adopts the Federal ban, it has no enforcement obligation. The agency also argues that some states already possess radar detector detectors. Finally, the agency notes that states may use federal grant money they receive for enforcement of highway safety pursuant to the 1984 Safety Act to enforce the ban. The agency clearly performed "some type" of cost-benefit analysis. Based on the significant discretion the states have to enforce the ban, we hold that the agency's failure to estimate the cost of enforcement does not render the rulemaking arbitrary and capricious.

Petitioners also argue that the cost assessment is flawed. Petitioners first argue that the cost assessment is flawed because the agency did not provide any bases for determining the relevant number of accidents involving speeding and radar detectors which the ban will purportedly affect. However, in its regulatory evaluation, FHWA explained how it calculated this number. In order to calculate the relevant number of accidents the ban will affect, the agency multiplied the number of CMV accidents in 1990, as reported by the National Highway Traffic

Safety Administration ("NHTSA"), by an estimate of the percentage of these accidents in which speeding was a contributing factor, as determined by NHTSA's Summary of Medium and Heavy Truck Crashes in 1990. The agency then estimated the percentage of these accidents in which a radar detector was used relying on two IIHS studies. We conclude that this analysis satisfies the statutory cost assessment requirement and is not arbitrary and capricious.

Finally, petitioners argue that the cost assessment is flawed because it does not provide a basis for its assumption that the ban would cause all relevant injuries to be reduced by one Maximum Adjusted Injury Scale ("MAIS") level. The agency presented evidence that a radar detector ban would result in a reduction in speed, which would result in a lesser degree of injury when those vehicles are involved in accidents. While the agency did not present any evidence to support its assumption that the ban would result in a one MAIS level reduction in the severity of accidents, we find that this "difficulty in establishing specific, quantified cost or benefit data" should not render the rulemaking arbitrary and capricious. S. Rep. No. 98-554, 98th Cong., 2d Sess. 8 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4792. Accordingly, we hold that the agency conducted a cost-benefit assessment of the rulemaking, and its assessment was not arbitrary and capricious.

C.

Petitioners argue that the agency's rulemaking must be stricken because the agency was improperly influenced by Congressional pressure thus rendering the rulemaking arbitrary and capricious. Petitioners argue that in 1988, FHWA rendered its professional judgment that, based on the information available, no rulemaking should be undertaken because of the lack of scientific evidence establishing a correlation between radar detector use and traffic safety. Petitioners further assert that FHWA changed its position because of political pressure from

Congress ordering the agency to adopt a ban on radar detectors in CMVs. Specifically, petitioners point to two instances of alleged Congressional pressure. First, petitioners argue that Congress ordered the agency to promulgate such a rulemaking by stating in a rider in the 1992 DOT Appropriations Act:

> The Secretary of Transportation shall publish by January 15, 1992, a notice of proposed rulemaking with regard to amending the Federal Motor Carrier Safety regulations to prohibit the use of radar detectors in operating commercial motor vehicles. Such notice shall solicit testimony regarding the safety, economic, and operational aspects of prohibiting radar detectors in commercial operations.

Pub. L. No. 102-143, § 342 (Oct. 28, 1991). Second, petitioners allude to "pressure subsequently applied by the senate committee which controlled [the agency's] budget." Petitioner's Brief at 30. In 1993, the Senate Appropriations Committee noted that "FHWA has indicated that there is inadequate information on the role of radar detectors in crashes involving commercial motor vehicles." Senate Appropriations Committee Report, S. Rep. No. 150, 103d Cong., 1st Sess. 111-12 (1993). In this connection, the Committee directed the agency to conduct a study of the correlation between radar detector use in CMVs and traffic safety. The Committee further stated that it was "displeased that the FHWA has not moved forward with the rulemaking that would ban radar detectors in commercial motor vehicles. The Committee directs that the Administrator and the Associate Administrator inform the Committee as soon as possible on the future direction that the Agency will pursue regarding this matter." Senate Appropriations Committee Report, S. Rep. No. 150, 103d Cong., 1st Sess. 111-12 (1993).

Before an administrative rulemaking may be overturned on the grounds of Congressional pressure, two conditions must be met. "First, the content of the pressure upon the

Secretary [must be] designed to force him to decide upon factors not made relevant by Congress in the applicable statute. . . . Second, the Secretary's determination must be affected by those extraneous considerations." *Sierra Club v. Costle*, 657 F.2d 298, 409 (D.C. Cir. 1981) (citing *D.C. Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1030 (1972)); *Peter Kiewet Sons' Co. v. United States Army Corps of Eng'rs*, 714 F.2d 163, 169-70 (D.C. Cir. 1983); *Town of Orangetown v. Ruckleshaus*, 740 F.2d 185, 188 (2d Cir. 1984); *Citizens Comm. Against Interstate Route 675 v. Lewis*, 542 F. Supp. 496, 579 (S.D. Ohio 1982).

Thus, we must determine whether the Congressional remarks regarding a ban of radar detector use in CMVs were designed to force the agency to consider factors not made relevant by Congress in the 1984 Safety Act when determining whether to promulgate the rulemaking. First, we conclude that petitioners incorrectly describe the Congressional rider in the 1992 DOT Appropriations Act as an order mandating the agency to ban radar detectors. In contrast, the Appropriations Act merely directed the agency to publish a notice of proposed rulemaking in order to "solicit testimony regarding the safety, economic, and operational aspects of prohibiting radar detectors in commercial operations." 1992 DOT Appropriations Act, Pub. L. No. 102-143, § 342 (1991). Therefore, Congress did not force the agency to consider factors outside of those in the 1984 Safety Act but simply directed that a rulemaking be undertaken pursuant to, and in accordance with the rulemaking provisions of the 1984 Safety Act. Thus, we also reject petitioners' argument that by ordering the agency to ban radar detectors in CMVs, Congress violated the principles of separation of powers. *See Metropolitan Washington Airport Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991).

Similarly, the Congressional remarks made by the 1993 Senate Appropriations Committee did not direct the agency to adopt a ban. Petitioners cite *D.C. Federation* in support

of their argument that the rulemaking must be reversed due to improper political pressure. However, petitioners' reliance on *D.C. Federation* is misplaced. In *D.C. Federation*, a Representative of the House attempted to coerce a favorable decision from the Secretary of Transportation by threatening to withhold funds for another project. In fact, those funds were blocked pending the decision of the Secretary. *D.C. Federation*, 459 F.2d at 1245. Clearly, the alleged political pressure in this case does not rise to this level of egregiousness. In this case, the Senate Appropriations Committee did not order the agency to promulgate a rulemaking banning radar detectors in CMVs nor did they threaten to withhold the agency's funds if the agency did not comply with their wishes. Rather, the Committee merely expressed its displeasure that the agency had not taken action in the eighteen months since the NPRM was issued. Moreover, the Committee directed the agency to conduct a study on the correlation between the use of radar detectors in CMVs and traffic safety and to inform the Committee "as soon as possible on the future direction that the Agency will pursue regarding this matter." S. Rep. No. 150, 103d Cong., 1st Sess. 111 (1993). Thus, the Committee did not urge the agency to consider extraneous factors when considering the rulemaking.

Furthermore, the Congressional remarks at issue in this case were not improper. As the District of Columbia Circuit noted in *Costle*:

> Americans rightly expect their elected representatives to voice their grievances and preferences concerning the administration of our laws. We believe it entirely proper for Congressional representatives to represent the interests of their constituents before administrative agencies engaged in informal, general policy rulemaking, so long as individual Congressmen do not frustrate the intent of Congress as a whole as expressed in statute, nor undermine applicable rules of procedure. Where Congressmen keep their comments

> focused on the substance of the proposed rule . . . administrative agencies are expected to balance Congressional pressure with the pressures emanating from all other sources. To hold otherwise would deprive the agencies of legitimate sources of information and call into question the validity of nearly every controversial rulemaking.

Costle, 657 F.2d at 409-10. Moreover, the agency clearly stated in the preamble to the final rule that the basis for its rulemaking was grounded in the safety issues presented in the comments it received and studies in the 1990 petition for rulemaking. Radar Detectors in Commercial Motor Vehicles, 58 Fed. Reg. 67370, 67371 (1993). Further, the agency prepared its regulatory evaluation in support of the final rule in August 1993, and the Senate Appropriations Committee Report, which allegedly improperly pressured the agency, was not issued until September 29, 1993. Accordingly, we hold that the agency did not consider extraneous factors when determining whether to promulgate the rulemaking banning the use of radar detectors in CMVs.[12]

D.

Finally, the Owner-Operator Independent Drivers Association, Inc. ("OOIDA"), amicus curiae in support of petitioners, argues that by banning the use of radar detectors in CMVs only, the rulemaking denies CMV operators equal protection of the laws in violation of the Due Process Clause of the Fifth Amendment. Specifically, OOIDA argues that the justification for the rule, that radar detectors cause speeding and speeding causes accidents,

---

[12] Petitioners make an unusual request that we transfer the action to a district court for an evidentiary hearing pursuant to 28 U.S.C. § 2347 if we conclude, as we do, that the record does not support their argument that FHWA promulgated the rulemaking because of improper Congressional pressure. From our review of the record, we do not believe that an evidentiary hearing is warranted.

applies equally to all vehicles and that the agency improperly limited the ban to CMVs because of "'a . . . congressional desire to harm a politically unpopular group[,]'" i.e., CMV operators. OOIDA's Brief at 3 (quoting *Johnson v. Robison*, 415 U.S. 361, 383 (1974)).

The Supreme Court has held that "Fifth Amendment equal protection claims are cognizable under the Amendment's Due Process Clause." *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 75 n.1 (1977). Moreover, "'[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.'" *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 93 (1976)). In determining whether the agency denied CMV operators equal protection of the laws by only prohibiting the use of radar detectors in CMVs,

> . . . our analysis of the classification proceeds on the basis that, although an individual's right to equal protection of the laws 'does not deny . . . the power to treat different classes of persons in different ways(;) . . . (it denies) the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'

Robison, 415 U.S. at 374-75 (quoting *Reed v. Reed*, 404 U.S. 71, 75-76 (1971)). In addition, this court has held that "When an allegedly unconstitutional classification involves 'the area of economics and social welfare' and does not involve suspect classifications or fundamental rights . . . a court must examine the classification in accordance with a 'rational basis' standard." *Malis v. Hills*, 588 F.2d 545, 548 (6th Cir. 1978) (quoting *Dandridge v. Williams*, 397 U.S. 471, 485 (1970)).

The purpose of the 1984 Safety Act, the statute creating FHWA's rulemaking authority, is to "promote the safe operation of commercial motor vehicles . . . and to assure increased compliance with traffic laws . . ." 49 U.S.C. app. § 2501. The agency argues that the radar detector ban is properly limited to CMVs because (1) Congress demonstrated a clear concern for the safe operation of CMVs on interstate highways by enacting the 1984 Safety Act, and (2) the different physical characteristics of CMVs and other vehicles justifies different treatment. We agree. As discussed above, FHWA promulgated the rulemaking in order to reduce speeding and thereby reduce the severity of accidents when they occur. Moreover, because CMVs are much larger and heavier than other vehicles, the damage they cause when they are involved in accidents at excessive speeds is much greater. Thus, we conclude that drivers of CMVs and drivers of other vehicles are not similarly circumstanced for purposes of an equal protection claim. Further, petitioners presented no evidence that the rulemaking was designed primarily to harm a politically unpopular group. Therefore, we hold that the application of the ban to CMVs only is rationally related to the safety objective of the 1984 Safety Act and does not violate equal protection guarantees of the Fifth Amendment.

III.

For the reasons stated, the petition for review of the rulemaking of the Federal Highway Administration banning radar detector use in commercial motor vehicles is DENIED.

58 FR 67370

RULES and REGULATIONS

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

49 CFR Parts 390 and 392

(FHWA Docket No. MC-90-14)

RIN 2125-AC69

Radar Detectors in Commercial Motor Vehicles

Tuesday, December 21, 1993

*67370 AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Final rule.

SUMMARY: The FHWA is amending 49 CFR parts 390 and 392 to ban the use of radar detectors in all commercial motor vehicles (CMVs) as defined in 49 CFR 390.5. This final rule completes an action initiated in response to the Congressional mandate set forth in section 342 of the Department of Transportation and Related Agencies Appropriations Act, 1992 (Pub. L. 102-143) and responds to a petition filed *67371 jointly on July 18, 1990, by the Insurance Institute for Highway Safety and seven other organizations.

EFFECTIVE DATE: January 20, 1994.

FOR FURTHER INFORMATION CONTACT: Mr. Robert Redmond, Driver Standards Division, Office of Motor Carrier Standards, (202) 366-4001, or Mr. Paul Brennan, Office of the Chief Counsel, (202) 366-0834, Federal Highway Administration, 400 Seventh Street SW., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m. e.t., Monday through Friday, except legal Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

This final rule completes action initiated under Public Law 102-143 (signed October 28, 1991). Section 342 of that public law required the Secretary of Transportation to publish a notice of proposed rulemaking to amend the Federal Motor Carrier Safety Regulations to prohibit the use of radar detectors in operating commercial motor vehicles.

This final rule also responds to a July 18, 1990, petition jointly filed by the following organizations:

(1) Advocates for Highway and Auto Safety;

(2) American Automobile Association;

(3) American Trucking Associations;

(4) Insurance Institute for Highway Safety;

(5) International Association of Chiefs of Police;

(6) National Association of Governors' Highway Safety Representatives;

(7) National Safety Council; and

(8) Public Citizen.

In the 1992 DOT Appropriations Act, the Congress directed the Secretary of Transportation to initiate rulemaking proposing a national ban on the use of radar detectors in CMVs (Pub. L. 102-143, section 342 (Oct. 28, 1991)). On January 24, 1992, at 57 FR 2885 the FHWA

published a notice of proposed rulemaking (NPRM) proposing to ban the use of radar detectors in CMVs that are under the FHWA's jurisdiction. The comment period closed on May 26, 1992.

Based on comments received to the docket, the FHWA acknowledges that traffic engineering experts, various sectors of the transportation industry, enforcement authorities, other organizations, drivers of CMVs and automobiles, and the general public hold widely divergent views on the rationale for, and efficacy of, banning the use of radar detectors in CMVs. Moreover, the FHWA recognizes that scientific proof unequivocally establishing a direct causative linkage between radar detector use and CMV accidents may not exist. Nevertheless, the FHWA believes that sufficient safety rationale and justification exist to support banning the use of radar detectors in CMVs as discussed more fully below. The FHWA is aware that the Senate report accompanying the 1994 Department of Transportation Appropriations Bill (S. Rpt. 103-150 at 111) directed the FHWA to further study the effects of radar detector use by CMVs on highway safety. The FHWA intends to carefully monitor the effects of the radar detector ban on CMV operations and safety.

The final regulatory evaluation for this rulemaking, which is contained in the public docket, has been completed and summarizes data on the relationships between radar detector use and speeding, and between speeding and accident severity, including additional statistical data provided by commenters to the January 24, 1992, NPRM (57 FR 2885).

Discussion of Petition

On July 18, 1990, the FHWA received from the Insurance Institute for Highway Safety and 7 other organizations a petition for rulemaking to ban the use of

radar detectors in CMVs regulated by the FHWA. In support of the petition, evidence was submitted that (1) radar detector use correlates with speeding, (2) drivers of tractor/trailer combinations use radar detectors more frequently than drivers of any other vehicle types and (3) drivers of tractor/trailer combinations using radar detectors are 2 to 3 times more inclined to speed than those without.

Petitioners' data consist mostly of observations made in Maryland and Virginia and five other eastern States. One study shows that of tractor/trailer combinations observed to be speeding in Maryland (856) and Virginia (943), those operating with radar detectors were 3 times as likely in Maryland and 2 times as likely in Virginia to exceed 65 mph than CMVs without radar detectors. The study also showed that approximately 40 percent of all CMVs were operated with radar detectors. The petitioners concluded that an FHWA ban on the use of radar detector devices in CMVs is warranted and justified. The FHWA agrees, even though the petitioners' studies were not necessarily applicable to all motor carrier operations and there is no established direct linkage between radar detector use and highway accidents. Based on petitioners' information and comments received to the docket, the FHWA has determined that the societal benefits to be derived from unhampered speed law enforcement overwhelmingly outweigh the anticipated marginal benefits associated with individual radar detector utilization in CMVs.

Discussion of the NPRM Docket Comments

Prior to taking final action on this rulemaking, the FHWA considered a total of 26,454 comments which were received to the docket. The following table displays the comments by respondent class:

Table 1

Respondents to the Notice of Proposed Rulemaking by Category

Departments of State, Transportation and Motor Vehicles	24
Police Agencies	442
Safety Interest Groups	50
Radar Detector Industry	23
Legal Profession	97
Motor Carriers and Drivers	458
Trucking and Motorcoach Associations	7
Other Organizations	378
General Public	313
Form Letters and Petitions (total signatures)	24,667
Total Respondents	26,459

Departments of State, Transportation and Motor Vehicles

All of the 24 Departments of State, transportation, or motor vehicles and the American Association of Motor Vehicle Administrators voiced strong support for banning the use of radar detectors in CMVs. For example, the

BEST AVAIL

Illinois Department of State concluded, based on findings from its Safe Trucking Task Force, created in 1991, that the only reason for using a radar detector is to evade the law. The Virginia DMV, in its pilot program, observed over 30,000 radar detectors in use since July of 1990. Of all CMVs observed, 40 percent were using radar detectors.

Police Agencies

The International Association of Chiefs of Police (IACP), the Commercial Vehicle Safety Alliance (CVSA) and over 400 State and local police provided comments to the docket. All but one of these agencies emphatically supported banning the use of radar detectors in CMVs. The Maine State Police was the lone dissenter. They believed a ban on radar detectors would not have the desired effect and would actually present a new set of problems for enforcement personnel.

Conversely, the Missouri Highway Patrol reports that speed is one of the *67372 major contributing factors to accidents in the State, especially in those cases resulting in death and personal injury. In all 1989 fatal traffic accidents occurring in Missouri, 42.3 percent involved speed as a contributing factor. For high speed violations, the proportion of arrested drivers having radar detectors in their vehicles also increased. The Missouri Highway Patrol found that of those drivers driving up to 10 mph over the posted speed limit, 26.4 percent had radar detector devices in use. For those travelling between 11 and 20 mph over the posted speed limit, 28.1 percent had radar detectors in use and for those vehicles travelling 21 mph or more over the posted speed limit, 38.1 percent were using such devices.

The New Jersey Department of Law and Public Safety also reported a positive correlation between radar detector use and excessive speed (speed limit presumed to

ABLE COPY

be 55 mph). They observed that 90 percent of radar detector users exceeded speeds of 60 mph and 40 percent exceeded speeds of 65 mph. By comparison, 70 percent of the non-detector users exceeded 60 mph and less than 20 percent exceeded 65 mph.

The Arizona Department of Public Safety reported that their survey conducted during the FHWA-sponsored "Roadcheck '91," found that 60 percent of all CMVs checked for radar detectors in a 72-hour period were equipped with such devices.

Safety Interest Groups

Over 45 comments were received from various safety interest groups. Comments in support of the proposal were unanimous. For example, the National Association of Governor's Highway Safety Representatives, Public Citizen and Advocates for Highway and Auto Safety rely on petitioners' data and various National Highway Traffic Safety Administration studies to argue in favor of the ban. These organizations believe that the only purpose for a radar detector is to permit a driver to speed; and therefore allow drivers to break the law. These organizations strongly encourage the FHWA to ban radar detectors in CMVs.

Radar Detector Industry

Of the seven radar detector manufacturers that commented, all voiced strong opposition to the FHWA's proposal to ban the use of radar detectors in CMVs. For example, the President of Valentine Research, Inc., commented that his customers (users of radar detector devices) are practicing "Jeffersonian democracy" in using his product. He argues that his customers should be free to travel at speeds that they consider safe, especially since the

speed limits across the country have been under-posted by as much as 15 mph. However, the manufacturer also readily admits that the primary purpose of radar detectors is to permit drivers to speed, which he refers to as "voting with their accelerators." Other representatives argue that radar units frequently malfunction and give inaccurate speed readings, resulting in State enforcement which they claim borders on harassment of innocent drivers.

RADAR, Inc.'s comments point out the FHWA's and petitioners' inability to cite research establishing a linkage between radar detector usage and excessive speeds. It contends that in those States which have banned such devices, there has been no significant impact in reducing radar detector usage or vehicle speeds. Also, it argues that should the FHWA ban become final, approximately 8,400 jobs in the radar detector industry will be adversely affected.

Legal Profession

Of the 97 comments received from the legal profession, 28 commenters supported the ban as proposed, asserting that these devices serve no legal purpose. Those commenters opposing the proposal question the necessity of such governmental intervention by raising legal and constitutional issues concerning search and seizure.

Motor Carriers and Drivers

Of the more than 400 trucking representatives/companies that commented, an overwhelming number (over 95 percent) voiced strong opposition to the FHWA proposal. Most of the trucking representatives viewed the action as an infringement upon individual rights. For example, one trucker from Ohio brings up the legal comparison of banning radar detectors

to cable companies trying to ban satellite dishes. He asserts that Congress decided that "airwaves were free out in the air and free to anyone who wanted to receive them." Others cited a Maryland court case where Government Employees' Insurance Company (GEICO) cancelled an insurance policy 'because' the policy holder used a radar detector. Apparently, GEICO's action was overturned by a Maryland court on the grounds that it was an unfair discriminatory practice. Moreover, drivers contend that they are being unfairly treated by some police organizations through unwarranted speed enforcement. Thus, they argue, they will be losing a valuable protection against such abuse, i.e., because of the inaccuracy of speed detection devices, their possession of radar detectors serves a justifiable purpose.

Trucking and Motorcoach Associations

The American Trucking Associations (ATA), the National Private Truck Council (NPTC), the American Bus Association (ABA) and the Motor Vehicle Manufacturers Association support the proposal. The ATA stated that the majority of motor carriers have policies prohibiting the use of radar detectors. Those carriers that do not have such policies believe that Federal action is necessary in order that they may legally maintain an enforceable policy. The NPTC and the ABA believe previous research demonstrates that use of radar detectors is linked to increased travel speeds and thus the FHWA should ban radar detectors and any other future speed measurement detection technology.

Additionally, ABA asserts that if the proposal is adopted the States should be required to pass legislation to ban radar detectors as a condition of receiving Motor Carrier Safety Assistance Program (MCSAP) funds. On the other hand, the Owner-Operator Independent Drivers Association (OOIDA) commented that the FHWA's proposal is an infringement upon States' rights since speed

enforcement on interstate highways is a function of State law, policy and practice.

Other Organizations

Over 350 comments were received from various insurance organizations, private businesses, and health care professionals. Comments in support of the proposal were nearly unanimous. These organizations endorsed the proposition that the only use for radar detectors was to help break the law.

General Public

Of the more than 300 comments received from the general public, approximately 55 percent voiced strong opposition to the ban for a variety of reasons, including the fear that a ban in CMVs will lead to a ban in all vehicles; that there is a constitutional right to send and receive signals through the air waves; that the ban discriminates against CMV drivers; and that there is no evidence to support the ban.

Form Letters and Signature Petitions

In addition to the comments discussed above, the FHWA received many form letters and petitions containing numerous signatures. *67373 Approximately 19,000 opposed the ban and 5,500 were in favor of it.

Enforcement Policy

In the NPRM, the FHWA proposed enforcement of the ban to be accomplished under the provisions of 49 CFR 392.5. By amending this section, drivers and companies may be cited for possession or use of all devices defined as

radar detectors and, consequently, subject to the penalty provision of 49 U.S.C. 521 or a corresponding State penalty provision. Several commenters suggested that the FHWA should require States to adopt legislation to ban radar detectors in CMVs as a condition for receiving MCSAP funds. The FHWA will consider this issue in the future. In the meanwhile, given the overwhelming support from law enforcement agencies, the FHWA expects that the States will adopt the provision as they adopt changes to the FMCSRs. In addition to highway enforcement, the FHWA also expects States to enforce the ban as part of the routine roadside inspection process conducted under the MCSAP. Thus, the FHWA believes that it is not critical for purposes of this rulemaking to address the issue of making adoption of the ban by States as a condition for receiving MCSAP funds at this time.

Discussion of Questions

The NPRM requested comment to the docket on three questions concerning specific provisions of the rulemaking (Questions 1 to 3).

Question 1: Should the definition of "radar detector" be expanded to anticipate and include devices that may allow drivers to detect advanced speed limit enforcement technology such as laser beams?

The overwhelming majority of the respondents who addressed this question, which included 26 State law enforcement agencies, 6 State departments of transportation/departments of motor vehicles and the Commercial Vehicle Safety Alliance (CVSA), were in favor of expanding the definition of "radar detector" to include other detection devices such as laser detectors. The FHWA agrees. The FHWA is, therefore, expanding the definition to include other detection devices as more fully discussed in the section-by-section analysis.

Question 2(a): How widespread are permanently or semipermanently installed radar detectors in CMVs nationwide?

The majority of the respondents who addressed this question, which included 20 State law enforcement agencies and 3 of the petitioners, provided no specific information. Other commenters indicated a range from 35 percent to 75 percent use in CMVs. Notwithstanding the uncertainty concerning the extent of actual nationwide use, the FHWA believes that detector use is sufficiently widespread to require a ban on its use in CMVs.

Question 2(b): What would be the impacts of dealing with such installed devices as vehicle appurtenances under Parts 393 and/or 396?

Most of the respondents who addressed this question, which included 22 State law enforcement agencies and 2 State departments of transportation/departments of motor vehicles, either did not have an opinion on the impact or offered very general comments on effectiveness without specifically addressing Parts 393 and/or 396. The FHWA has, therefore, decided not to address radar detectors under Parts 393 or 396 in this rulemaking.

Question 2(c): Should discovery of such a device upon inspection be grounds for a vehicle out-of-service order under s396.9?

The overwhelming majority of the respondents who addressed this question, which included 23 State law enforcement agencies and 5 State departments of transportation/departments of motor vehicles, were against making the discovery of such a device being grounds for a vehicle out-of-service order under section 396 because such possession or use would not constitute an imminent hazard as defined in the out-of-service criteria. The FHWA agrees and will not address radar detectors under section 396 in this rulemaking. Discovery of such a device will not be grounds for a CMV out-of-service order.

Question 2(d): If not, what should the consequences of discovery of such a device be?

The overwhelming majority of the respondents who addressed this question, which included 21 State law enforcement agencies, believed that the consequences should include a citation and fine, confiscation of the device, or both. The FHWA agrees that a citation and fine should be imposed, but not confiscation because we do not believe it is within our present authority to seize property summarily and, therefore, do not intend to impose such a requirement on States. If a State has independent authority to seize such property and elects to exercise this authority, this rule does not prohibit such an enforcement practice.

Question 3: How would State enforcement programs and procedures be affected by the adoption of this proposal?

The majority of the respondents who addressed this question, which included 20 State law enforcement agencies and 2 of the petitioners, believed that the ban on the use of radar detectors in CMVs should either supplement existing State enforcement policies or should be included in States' statutes to support enforcement policies. The FHWA realizes that the final rule will encourage States to enforce the ban on radar detectors in CMVs engaged in intrastate as well as interstate commerce as part of the MCSAP. There will be a positive effect on State speed enforcement programs and procedures resulting in an improvement in overall highway safety.

In addition to the above questions, the NPRM requested comments on several other issues, including the operation and maintenance of equipment designed to enforce the ban (Questions 6 to 10). While most of the docket respondents did not directly comment on these specific issues, the general subject matter was covered by many of the respondents. The few respondents who did comment specifically on the issues did not refute or add to

the data submitted by the petitioners with respect to radar detector detection technologies. The FHWA is satisfied that existing technology is reasonably available to detect the use of radar detectors which will facilitate enforcement of the ban.

Section-by-Section Analysis

Definition of Radar Detector

History has demonstrated that as radar equipment used by law enforcement agencies is upgraded and becomes more sophisticated, the radar detection industry has quickly responded with its own upgraded and more sophisticated equipment. As a means of combatting this situation, law enforcement agencies are starting to look at other technologies to help them in speed limit enforcement, such as aerial and VASCAR strategies and new technologies, such as laser beams. Although the FHWA believes that fewer than 400 laser units are currently in use around the country, due to their current cost of approximately 3 times that of a radar detector unit, law enforcement agencies are gradually adding this highly effective technology to their speed enforcement program.

As the CVSA stated in its docket response to Question 1, "A broader definition will accommodate the changes we are likely to see in years to come." The overwhelming majority of the respondents to Question 1 echoed that same thought. The FHWA is, *67374 therefore, expanding the definition to include any device that detects radio microwaves, laser beams or any other future speed measurement technology used by law enforcement agencies on highways for enforcement purposes as a means of preventing the compromise of new, more effective enforcement tools.

Applicability

This final rule changes portions of 49 CFR parts 390 and 392 to directly affect drivers of CMVs as defined in part 390, which include vehicles used in interstate commerce to transport passengers or property when the vehicle--

(1) Has a gross vehicle weight rating or gross combination weight rating of 10,001 or more pounds; or

(2) Is designed to transport 16 or more passengers, including the driver; or

(3) Is used to transport hazardous materials in quantities that require placarding.

Vehicles that meet the above definition and are used exclusively in intrastate commerce also may be indirectly affected. Under the MCSAP, most States adopt the Federal Motor Carrier Safety Regulations and enforce the requirements with respect to both interstate and intrastate drivers and carriers. Section 390.5 defines "radar detector" as any device or mechanism that detects radio microwaves, laser beams or any other future speed limit measurement technology used by enforcement officials to measure the speed of CMVs upon public roads and highways for enforcement purposes.

The definition would specifically exclude detectors that are:

(1) Transported outside the driver's compartment of the vehicle; and

(2) Completely inaccessible to, inoperable by, and imperceptible to the driver.

Under item number (1) above, since the driver and passenger areas of a bus constitute a single compartment, the final rule notes that the "driver's compartment" of a passenger-carrying CMV includes all space designed to accommodate the driver and passengers alike.

If both of the above conditions are met, a radar detection device would be excluded from the definition of "radar detectors" and its transportation in a CMV would be permitted. This will allow a driver apprehended with a radar detector to continue legally operating the CMV by disengaging the device and storing it outside the cab.

Rulemaking Analysis and Notices

Executive Order 12291 (Federal Regulation) and DOT Regulatory Policies and Procedures

The FHWA has determined that this document does not contain a major rule under Executive Order 12291. It is considered to be a significant regulation under the regulatory policies and procedures of the Department of Transportation because of the substantial public interest and controversy involving the use of radar detectors. A regulatory evaluation addressing regulatory impacts has been prepared and is available for inspection in the Docket Room 4232 of the FHWA, 400 Seventh Street SW., Washington, DC 20590. The FHWA regulatory evaluation presents the agency's evaluation of the economic and other impacts of this final rule. This evaluation finds the benefits of this action are five times larger than the cost. The agency's methodology and calculations used to derive this estimate are contained in Appendix A to the Regulatory Evaluation.

Regulatory Flexibility Act

Based on information available to the FHWA and under the criteria of the Regulatory Flexibility Act (5 U.S.C. 601-612), the FHWA has determined that this action will not have a significant economic impact on a substantial number of small entities. This regulation does not ban the

production of radar detectors, and manufacturers would still be allowed to sell the devices to automobile drivers and foreign markets. The FHWA believes that the manufacturers' core business is passenger vehicle drivers and given the relative sizes of the heavy vehicle and passenger vehicle populations, any potential economic impact should not be significant.

Executive Order 12612 (Federalism Assessment)

The final rule will impact the policy-making discretion of the States. The FHWA has reviewed the ban on radar detectors in light of the purposes of the underlying legislation and the Executive Order on Federalism (Executive Order 12612, October 26, 1987), which requires Executive departments and agencies to be guided by certain fundamental federalism principles while formulating and implementing policies. These policies have been taken fully into account in the development of this regulation.

In 1988, the FHWA received a similar petition from five of the organizations that signed the 1990 petition. On November 8, 1988, the FHWA denied that petition on the grounds that a Federal ban on radar detectors would violate the principles of federalism because the situation "is common to the States and not truly national in scope." The FHWA continues to recognize that the enforcement of speed limit laws on the highways is a function of State law, policy and practice. Nevertheless, the FHWA is empowered with long-standing authority to regulate the safety of operators interstate motor carriers of passengers and property under 49 U.S.C. 3102. In particular, the Motor Carrier Safety Act of 1984 (1984 Act) (Pub. L. 98-554, 98 Stat. 2832) also provides ample authority for this rulemaking. In addition, Public Law 102-143 specifically directs the Department of Transportation to publish a rulemaking addressing this issue. The Senate

Committee report on Public Law 102-143 stated that, "while the general prohibition of radar detectors is properly left to the States, the use of radar detectors in vehicles in interstate commerce is an appropriate arena for the Federal Government to regulate." [FN1] Consistent with federalism principles, the final rule provides for a Federal ban, but provides significant discretion for States in their enforcement.

FN1 S. Rep. No. 148, 102d Cong., 1st Sess. 90 (1991).

It is certified that the policies contained in this document have been assessed in light of the principles, criteria, and requirements of the Federalism Executive Order. The FHWA has determined that this action accords fully with the Federalism Executive Order.

Executive Order 12372 (Intergovernmental Review)

Catalog of Federal Domestic Assistance Program Number 20.217, Motor Carrier Safety. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this program.

Paperwork Reduction Act

This action does not contain a collection of information requirement for purposes of the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 et seq.

National Environmental Policy Act

The agency has analyzed this action for the purpose of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) and has determined that this action

would not have any effect on the quality of the environment.

*67375 Regulation Identification Number

A regulation identification number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross reference this action with the Unified Agenda.

List of Subjects in 49 CFR Parts 390 and 392

Commercial motor vehicles, Highways and roads, Motor vehicle safety, Radar detectors.

Issued on: December 14, 1993.

Rodney E. Slater,

Federal Highway Administrator.

In consideration of the foregoing, the FHWA hereby amends Title 49, Code of Federal Regulations, Chapter III, Subchapter B, as set forth below.

PART 390--FEDERAL MOTOR CARRIER SAFETY REGULATIONS; GENERAL (AMENDED)

1. The authority citation for 49 CFR Part 390 continues to read as follows:

Authority: 49 U.S.C. app. 2503 and 2505; 49 U.S.C. 3102 and 3104; 49 CFR 1.48.

2. Section 390.5 is amended by adding one definition, placing it in alphabetical order to read as follows:

§390.5 Definitions.

* * * * * Radar detector means any device or mechanism to detect the emission of radio microwaves, laser beams or any other future speed measurement technology employed by enforcement personnel to measure the speed of commercial motor vehicles upon public roads and highways for enforcement purposes. Excluded from this definition are radar detection devices that meet both of the following requirements:

(1) Transported outside the driver's compartment of the vehicle. For this purpose, the driver's compartment of a passenger-carrying CMV shall include all space designed to accommodate both the driver and the passengers; and

(2) Completely inaccessible to, inoperable by, and imperceptible to the driver while operating the vehicle.

* * * * * PART 392--DRIVING OF MOTOR VEHICLES (AMENDED)

3. The authority citation for 49 CFR part 392 continues to read as follows:

Authority: 49 U.S.C. app. 2505; 49 U.S.C. 3102; 49 CFR 1.48.

4. Section 392.71 is added to subpart G, as follows:

§392.71 Radar detectors; use and/or possession.

(a) No driver shall use a radar detector in a commercial motor vehicle, or operate a commercial motor vehicle that is equipped with or contains any radar detector.

(b) No motor carrier shall require or permit a driver to violate paragraph (a) of this section.

(FR Doc. 93-30892 Filed 12-17-93; 5:00 pm)

57 FR 2885

PROPOSED RULES

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

49 CFR Parts 390 and 392

(FHWA Docket No. MC-90-14)

RIN 2125-AC89

Radar Detectors in Commercial Motor Vehicles

Friday, January 24, 1992

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of proposed rulemaking (NPRM); request for comments

SUMMARY: The FHWA proposes to ban radar detectors from all commercial motor vehicles (CMVs) as defined in the Federal Motor Carrier Safety Regulations in 49 CFR part 390. This proposal fulfills the Congressional mandate in section 342 of the Department of Transportation and Related Agencies Appropriations Act, 1992 (Pub. L. 102-143) and responds to a petition filed jointly on July 18, 1990, by the Insurance Institute for Highway Safety and seven other organizations.

DATES: Comments must be received on or before May 26, 1992.

ADDRESSES: Submit written, signed comments to FHWA Docket No. MC-90-14, Room 4232, HCC-10, Office of the Chief Counsel, Federal Highway Administration, 400 Seventh Street, SW., Washington, DC 20590. All answers to questions should refer to the appropriate question number and all comments on specific provisions should refer to the appropriate section and paragraph number. Commenters may, in addition to submitting "hard copies" of their comments, submit a floppy disk in standard or high density formats containing data compatible with either WordPerfect or WordStar for IBM systems; or with Microsoft Word or WordPerfect for Apple Macintosh systems. Commenters should clearly label submitted disk with the software format used (e.g., WordPerfect 5.0 (IBM) or Microsoft Word 4.0 (Mac)). All comments received will be available for examination at the above address from 8:30 a.m. to 3:30 p.m., e.t., Monday through Friday, except legal holidays. Those desiring notification of receipt of comments must include a self-addressed, stamped postcard.

FOR FURTHER INFORMATION CONTACT:The FHWA has established a special telephone number to receive inquiries regarding this NPRM. the number is 202-366-6816. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except legal holidays.

SUPPLEMENTARY INFORMATION:

Background

This rulemaking responds to Public Law 102-143 (signed October 28, 1991) which states at section 342:

The Secretary of Transportation shall publish by January 15, 1992, a notice of proposed rulemaking with regard to amending the Federal Motor Carrier Safety Regulations to prohibit the use of radar detectors in

operating commercial motor vehicles. Such notice shall solicit testimony regarding the safety, economic, and operational aspects of prohibiting radar detectors in commercial operations.

This NPRM also responds to a July 18, 1990, petition jointly filed by the following organizations:

(1) Advocates for Highway and Auto Safety,

(2) American Automobile Association,

(3) American Trucking Associations,

(4) Insurance Institute for Highway Safety,

(5) International Association of Chiefs of Police,

(6) National Association of Governors' Highway Safety Representatives,

(7) National Safety Council, and

(8) Public Citizen.

The petition, reproduced as an appendix to the preamble, claims that radar detector use correlates with speeding; that drivers of tractor/semitrailers use radar detectors more frequently than drivers of any other vehicle types; and that tractor/semitrailers with radar detectors are two to three times more prone to be speeding than those without. The petitioners assert that the principal use of radar detectors is to evade law enforcement and, because technology now exists for enforcement officials to detect radar detectors, request a ban on radar detectors in commercial motor vehicles regulated by the FHWA. Supporting information accompanied the petition and is available for public inspection in the docket at the above address.

In acting on the Congressional mandate, the FHWA acknowledges that traffic engineering experts, various sectors of the transportation industry, enforcement authorities, other organizations, drivers of CMVs and automobiles, and the general public hold widely divergent views on the rationale for, and efficacy of, banning radar detectors from CMVs. Moreover, the FHWA recognizes

that scientific proof establishing a direct causative linkage between radar detector use and CMV accidents may not exist. The draft regulatory evaluation for this proposal, which is contained in the public docket, summarizes data on the relationships between radar detector use and speeding, and between speeding and accidents. The FHWA encourages comments to provide additional statistical data on the safety issues posed by radar detector usage in CMVs.

Pursuant to the directive of the Congress, the FHWA invites commenters specifically to address the safety, economic, and operational aspects of prohibiting radar detectors in CMVs.

Commenters are also requested to specify, at or near the beginning of their docket responses, whether they: Support the proposed ban on radar detectors in CMVs without reservation; support the proposed ban, but with minor changes (please specify the changes); oppose the proposed ban unless major changes are made (please specify the changes); or oppose the proposed ban unequivocally.

Section-by-Section Analysis

Applicability. This NPRM would change portions of 49 CFR parts 390 and 392 to directly affect drivers of CMVs as defined in part 390, which generally include vehicles used in interstate commerce to transport passengers or property when the vehicle--

*2886 (1) Has a gross vehicle weight rating or gross combination weight rating of 10,001 or more pounds; or

(2) Is designed to transport 16 or more passengers, including the driver; or

(3) Is required to be placarded for hazardous materials.

However, vehicles that meet the above definitions and are used exclusively in intrastate commerce also may be indirectly affected. Under the Motor Carrier Safety Assistance Program (MCSAP), most States adopt the Federal Motor Carrier Safety Regulations and enforce the requirements with respect to both interstate and intrastate drivers and carriers. Section 390.5 would define "radar detector" as any device that detects radio microwaves used by enforcement officials to measure vehicular speeds on highways for enforcement purposes.

The definition would specifically exclude detectors that are:

(1) Transported outside the driver's compartment of the vehicle; and

(2) Completely inaccessible to, inoperable by, and imperceptible to the driver.

Under number (1) above, since the driver and passenger areas of a bus constitute a single compartment, the NPRM notes that the "driver's compartment" of a passenger-carrying CMV includes all space designed to accommodate the driver and passengers alike.

If both of the above conditions are met, a radar detection device would be excluded from the definition of "radar detectors" and its transportation in a CMV would be permitted.

Question (1): Should the definition of "radar detector" be expanded to anticipate and include devices that may allow drivers to detect advanced speed limit enforcement technology such as laser beams?

Question (2): (a) How widespread are permanently or semipermanently installed radar detectors in CMVs nationwide? (b) What would be the impacts of dealing with such installed devices as vehicle appurtenances under Parts 393 and/or 396? (c) Should discovery of such a device on inspection be grounds for a vehicle out-of-service

order under s 396.9? (d) If not, what should the consequences of discovery of such a device be?

A new s 392.71 would be added to part 392, "driving of motor vehicles." It would prohibit drivers from using a radar detector in a CMV and from operating a CMV that contains or is equipped with a radar detector. Motor carriers would be responsible to assure compliance with this prohibition. Individuals who violate the provisions of part 392 may be subject to penalties under 49 U.S.C. 521.

Question (3): How would State enforcement programs and procedures be affected by the adoption of the proposal?

Key Issues

In addition to the specific provisions of this proposal, respondents are invited to provide comments regarding the following issues:

Issue: Legitimate uses of radar detectors. The FHWA does not now possess data which would convincingly demonstrate that radar detectors have purposes other than to enable drivers to evade enforcement of lawful speed limits.

Question (4): What evidence exists for any legitimate use of radar detectors?

Issue: Effectiveness of radar detector bans. A study by one of the petitioners suggests that Virginia, in which use of radar detectors is illegal, may have a higher incidence of radar detector use than Maryland, where it is legal.

Question (5): What statistical or other evidence exists, either in the United States, Canada, or elsewhere, to show that: (a) radar detector bans actually reduce detector use and (b) reduced use of radar detectors will reduce speeding, accidents, injuries, and/or fatalities?

Issue: Radar detector detection technology. The petitioners believe that enforcement of a radar detector ban would depend on cost-effective, accurate technology to detect radar detectors. The petitioners' reports suggest that only one such device is currently available, the "VG-2."

Question (6): (a) Do enforcement agencies in the United States and Canada have recent field experience with the VG-2 or comparable device? (b) What is the accuracy of such devices under field conditions? (c) What is known of their availability.

Question (7): (a) What are the capital, operating, and maintenance costs of the VG-2 or comparable devices? (b) Do enforcement agencies currently regard them as cost-effective? (c) If so, what evidence is available to support such an opinion?

Question (8): (a) What other devices for radar detector detection are available? (b) What accuracy, cost, and availability data pertain to them?

Question (9): Would a counter-device to detect the VG-2 or similar radar detector detectors be technically feasible at a reasonable cost and available immediately to drivers?

Question (10): What constitutional or other legal problems do States and other respondents foresee with a CMV ban on radar detectors, enforced by technology accomplishing the same purpose as the VG-2?

Rulemaking Analyses and Notices

Executive Order 12291 (Federal Regulation) and DOT Regulatory Policies and Procedures

The FHWA has determined that this document does not contain a major rule under Executive Order 12291. It is considered to be a significant regulation under the regulatory policies and procedures of the Department of

Transportation because of the anticipated substantial public interest and controversy involving the use of radar detectors. A draft regulatory evaluation addressing regulatory impacts has been prepared and is available for review in the public docket.

Regulatory Flexibility Act

Based on information available to the FHWA at this time and under the criteria of the Regulatory Flexibility Act (Pub. L. 96-354), this action will not have a significant economic impact on a substantial number of small entities. However, due to the preliminary nature of this determination, all affected interests, including small entities, are encouraged to comment on the potential economic impacts this NPRM would generate.

Executive Order 12612 (Federalism Assessment)

The proposed rule would limit the policymaking discretion of the States. The FHWA has reviewed the proposed ban on radar detectors in light of the purposes of the underlying legislation and the Executive Order on Federalism (Executive Order 12612, October 26, 1987), which requires Executive departments and agencies to be guided by certain fundamental federalism principles while formulating and implementing policies. These policies have been taken fully into account in the development of this proposed regulation.

In 1988, FHWA received a similar petition from five of the organizations that signed the 1990 petition. On November 8, 1988, the FHWA denied that petition on the grounds that a Federal ban on radar detectors would violate the principles of federalism because the problem "is common to the States and not truly national in scope." The FWHA continues to believe that the enforcement of speed limit laws on the highways is a problem which is, in

general, common to the States and not truly national in scope.

*2887 However, authority for the proposed ban on radar detector use and possession under 49 CFR part 392 is inherent in the broad, long-standing powers conferred on the Secretary to regulate the safety on interstate motor carriers of passengers and property under Title 49 of the United States Code. In particular, the Motor Carrier Safety Act of 1984 (1984 Act) (Pub. L. 98- 554, 98 Stat. 2832) provides ample authority for this proposed rulemaking. In addition, Public Law 102-143 specifically directs the Department of Transportation to issue this proposal. The Senate Committee report on Public Law 102-143 stated that, "while the general prohibition of radar detectors is properly left to the States, the use of radar detectors in vehicles in interstate commerce is an appropriate arena for the Federal Government to regulate." [FN1]

FN1 Senate Report Number 102-148, 102d Congress, First Session, page 90 (1991).

As the FHWA has noted earlier in this document, there are serious questions about the safety justification for banning radar detectors. If safety justification is established, the FHWA must also decide whether a decision to ban such equipment is more appropriate for individual States to make, and specifically seeks comment on this issue. In this regard, the FHWA notes that three States and the District of Columbia have enacted legislation prohibiting the use of radar detectors. The FHWA specifically seeks comment on the relevance of other State's inaction concerning bans on radar detectors.

Since speed limits are generally established and enforced by the States, and since any State that so wished could adopt a ban on radar detectors if deemed necessary for effective enforcement and to promote safety, is it appropriate for the Federal Government to adopt such a

ban? At the same time, given the FHWA's authority in this area, if there is a clear linkage between radar detectors and accidents, is it inappropriate for the Federal Government not to ban radar detectors from CMVs?

It is certified that the policies contained in this document have been assessed in light of the principles, criteria, and requirements of the Federalism Executive Order. Because this notice is being issued in response to a statutory mandate, the FHWA has determined that this action accords fully with the Federalism Executive Order.

Executive Order 12372 (Intergovernmental Review)

Catalog of Federal Domestic Assistance Program Number 20.217, Motor Carrier Safety. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this program.

Paperwork Reduction Act

This action does not contain a collection of information requirement for purposes of the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 et seq.

National Environmental Policy Act

The agency has analyzed this action for the purpose of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) and has determined that this action would not have any effect on the quality of the environment.

Regulation Identification Number

A regulation identification number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN number contained in the heading of this document can be used to cross reference this action with the Unified Agenda.

List of Subjects in 49 CFR Parts 390 and 392

Commercial motor vehicles, Highways and roads, Motor vehicle safety, Radar detectors.

Issued on: January 17, 1992.

T.D. Larson,

Administrator.

Appendix to the Preamble

(Petition dated July 18, 1990 and sent under the letterhead of the Insurance Institute for Highway Safety, 1005 North Glebe Road, Arlington, Virginia 22201. The attachments to the petition, listed further below, are available for public inspection at the address and times contained in the "ADDRESSES" section of the Preamble.)

The Honorable Thomas D. Larson
Administrator
Federal Highway Administration
400 Seventh Street, SW.
Washington, DC 20590

Dear Mr. Larson:

The Advocates for Highway and Auto Safety, the American Automobile Association, the American Trucking Associations, the Insurance Institute for Highway Safety, the International Association of Chiefs of Police, the

National Association of Governor's Highway Safety Representatives, the National Safety Council, and Public Citizen hereby petition the Federal Highway Administration (FHWA) to begin rulemaking to ban the possession and use of radar detectors by operators of commercial vehicles regulated by the agency. A ban on radar detectors is needed to improve the compliance of commercial vehicle drivers with speed limits and to reduce the number and severity of crashes.

A ban on radar detectors has also been actively sought by the nation's law enforcement community. In April 1990, the Department of Transportation held a Traffic Safety Summit in Chicago, Illinois, at which state and local law enforcement officials discussed national priorities for improving highway safety. One of the specific recommendations of the summit participants was that FHWA should ban the use of radar detectors in commercial vehicles.

This petition also represents a continuation of prior efforts by organizations concerned about highway safety to ban the use of radar detectors. In May 1988, the Insurance Institute for Highway Safety, joined by the American Automobile Association, the American Trucking Associations, the International Association of Chiefs of Police, and the National Safety Council filed a similar petition requesting FHWA to begin rulemaking to ban radar detectors (Attachment I). Since FHWA's denial of that petition, further research has demonstrated the link between radar detectors and excessive speeds. Also, a ban at this time promises to be more effective than in the past because of the availability of radar detector detectors as an enforcement tool for police departments (Attachment II).

Link Between Radar Detectors and Speed

The most recent research on the use of radar detectors and vehicle speed again confirms that drivers using radar detectors are much more likely to be traveling at excessive speed. Using a device to identify radar detector use, researchers from the Institute recently measured radar detector use and vehicle speeds in Maryland and Virginia. As described in the attached report, the researchers found that all categories of vehicles with radar detectors observed at the Maryland sites were generally at least twice as likely as those without radar detectors to be traveling at speeds more than 10 mph above the speed limit (Attachment III). Because of Virginia's 65 mph speed limit, passenger car and light truck speeds were higher than in Maryland, but the relationship between radar detector use and speed followed a similar pattern, especially among the fastest vehicles. Radar detector equipped vehicles in Virginia were three times as likely to exceed 75 mph (more than 10 mph above the speed limit) than vehicles not equipped with radar detectors. It is important that in both states tractor-trailers were most likely to use radar detectors.

A new survey just completed by the Institute in seven eastern states provides additional data on radar detector use and speeds of large trucks. The study found that at least 36 percent of the trucks observed were using radar detectors, and at least 40 percent of tractor-semitrailers were using radar detectors (Attachment IV). At least 46 percent of the trucks carrying hazardous *2888 materials were using radar detectors. The trucks with radar detectors in use, including hazardous materials carriers, were more likely than those without to be traveling at excessive speeds.

It is also worth noting that Virginia and Connecticut--two states that ban radar detectors--were at the low end of the range of radar detector use, and these states had the fewest trucks for which radar detector use was possible but could not be determined with certainty. These

data suggest that the Connecticut and Virginia bans reduce radar detector use even though enforcement has been difficult. The availability of radar detector detectors to police departments should make such bans much more effective in the future.

Federal Action Needed

In denying the May 1988 petition seeking a ban on radar detectors, FHWA said that it was the agency's view that "the enforcement of speed limit laws on the highway is a problem which is common to the states and not truly national in scope." Since that time the Department of Transportation has further recognized the importance of speed enforcement and the need for additional federal support for state efforts. Also, state officials have renewed their requests for more federal efforts to assist them in their speed enforcement programs.

Federal regulation of speed enforcement as a national issue has been acknowledged in several ways. In September 1989, Secretary of Transportation Samuel K. Skinner wrote the Governors of each state seeking their "support" and participation in a nationwide campaign to highlight speed as a highway safety issue--including the dangers of speeding, the safety basis for speed limits, the need for effective speed law enforcement, and the importance of complying with posted speed limits on all public roadways."

In its February 1990 Statement of National Transportation Policy Strategies for Action, the Department of Transportation said that safety is its top priority. The Department specifically identified the need to target additional federal support to promote effective enforcement of state speed limits as an essential part of the U.S. national transportation policy.

The seriousness of speeding as a traffic safety issue and the need for additional federal support was also highlighted at the April 1990 Traffic Law Summit convened by Secretary Skinner. In his message to the summit participants, President Bush said, "Your agencies are getting tougher on speeding, and you should. We need greater respect for speed limits and an increased awareness of the real dangers posed by speeders on highways and our city streets. Simply put, speeders kill."

Recognizing that one important impediment to effective enforcement of speed limits is the use of radar detectors, the state officials participating in the summit urged the Department to ban those devices in commercial vehicles. Specifically, they recommended that the "initial approach should be for the Federal Highway Administration (FHWA) to immediately prohibit the commercial- vehicle use of radar detectors through regulation."

Conclusion

Excessive travel speeds and the corresponding increase in traffic deaths and injuries continue to be a serious problem in the United States. Research has consistently demonstrated that use of radar detectors is linked to increased travel speeds. State law enforcement officials have called on the department to aid their enforcement efforts by banning radar detectors. For these reasons and for the reasons stated in the May 1988 petition, we urge FHWA to promptly grant this petition and to initiate rulemaking to ban the possession and use of radar detectors in commercial vehicles.

Sincerely,

(Petition signed by:)

Judith Lee Stone, Executive Director, Advocates for Highway and Auto Safety

John Archer, Managing Director, American Automobile Association
Charles A. Gruber, President, International Association of Chiefs of Police
Jane S. Roemer, Executive Director, Federal Affairs, National Safety Council
Brian O'Neill, President, Insurance Institute for Highway Safety
Thomas J. Donohue, President and CEO, American Trucking Associations
Peter O'Rourke, Chairman, National Association of Governors' Highway Safety Representatives
Joan Claybrook, President, Public Citizen

List of Attachments to the Petition (see Note at beginning of this Appendix)

Attachment I: Petition (dated May 16, 1988, under the letterhead of the Insurance Institute for Highway Safety) for rulemaking to ban radar detectors in commercial vehicles

Attachment II: "Performance under controlled conditions of the Interceptor VG- 2 radar detector detector," Adrian K, Lund, et al., for the Insurance Institute for Highway Safety, June 1990.

Attachment III: "Radar detector use and speeds in Maryland and Virginia," Mark Freedman, et al., for the Insurance Institute for Highway Safety, May 1990.

Attachment IV: "Radar detector use in large trucks," Allan F. Williams, et al., for the Insurance Institute for Highway Safety, July 1990.

In consideration of the foregoing, the FHWA hereby proposes to amend title 49, Code of Federal Regulations, chapter III, subchapter B, as set forth below.

PART 390--FEDERAL MOTOR CARRIER SAFETY REGULATIONS; GENERAL

1. The authority citation for 49 CFR part 390 continues to read as follows:

Authority: 49 U.S.C. app. 2503 and 2505; 49 U.S.C. 3102 and 3104; 49 CFR 1.48.

2. Section 390.5 is amended by adding one definition, placing it in alphabetical order as follows:

§390.5 Definitions.

* * * * * Radar detector means any device or mechanism to detect the emission of radio microwaves which are employed by enforcement personnel to measure the speed of motor vehicles upon public roads and highways for enforcement purposes. Excluded from this definition are radar detection devices that meet both of the following requirements:

(1) Transported outside the driver's compartment of the vehicle. For this purpose, the driver's compartment of a passenger-carrying CMV shall include all space designed to accommodate both the driver and the passengers; and

(2) Completely inaccessible to, inoperable by, and imperceptible to the driver while operating the vehicle.

* * * * * PART 392--DRIVING OF MOTOR VEHICLES

3. The authority citation for 49 CFR part 392 continues to read as follows:

Authority: 49 U.S.C. app. 2505; 49 U.S.C. 3102; 49 CFR 1.48.

4. Section 392.71 is added to Subpart G, as follows:

§392.71 Radar detectors; use and/or possession.

(a) No driver shall use a radar detector in a commercial motor vehicle, or operate a commercial motor vehicle that is equipped with or contains any radar detector.

(b) No motor carrier shall require or permit a driver to violate paragraph (a) of this section.

(FR Doc. 92-1752 Filed 1-23-92; 8:45 am)

The Constitution of The United States of America

ARTICLE I.

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

* * *

Section 7. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it,

unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

* * *

[Amendment X]

The Powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Statutes

5 U.S.C. §706

§706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

§2321. Judicial review of Commission's orders and decisions; procedure generally; process

(a) Except as otherwise provided by an Act of Congress, a proceeding to enjoin or suspend, in whole or in part, a rule, regulation, or order of the Interstate Commerce Commission shall be brought in the court of appeals as provided by and in the manner prescribed in chapter 158 of this title.

(b) The procedure in the district courts in actions to enforce, in whole or in part, any order of the Interstate Commerce Commission other than for payment of money or the collection of fines, penalties, and forfeitures, shall be as provided in this chapter.

(c) The orders, writs, and process of the district courts may, in the cases specified in subsection (b) and in enforcement actions and actions to collect civil penalties under subtitle IV of title 49, run, be served and be returnable anywhere in the United States.

28 U.S.C. §2342

§2342. Jurisdiction of court of appeals

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of--

(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;

(2) all final orders of the Secretary of Agriculture made under chapters 9 and 20A of title 7, except orders issued under sections 210(e), 217a, and 499g(a) of title 7;

(3) all rules, regulations, or final orders of--

(A) the Secretary of Transportation issued pursuant to section 2, 9, 37, 41, or 43 of the Shipping Act, 1916 (46 U.S.C.App. 802, 803, 808, 835, 839, and 841a); and

(B) the Federal Maritime Commission issued pursuant to--

(i) section 23, 25, or 43 of the Shipping Act, 1916 (46 U.S.C.App. 822, 824, or 841a);

(ii) section 19 of the Merchant Marine Act, 1920 (46 U.S.C.App. 876);

(iii) section 2, 3, 4, or 5 of the Intercoastal Shipping Act, 1933 (46 U.S.C.App. 844, 845, 845a, or 845b);

(iv) section 14 or 17 of the Shipping Act of 1984 (46 U.S.C.App. 1713 or 1716); or

(v) section 2(d) or 3(d) of the Act of November 6, 1966 (46 U.S.C.App. 817d(d) or 817e(d) [FN1];

(4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42;

(5) all rules, regulations, or final orders of the Interstate Commerce Commission made reviewable by section 2321 of this title and all final orders of such Commission made reviewable under section 11901(j)(2) of title 49, United States Code;

(6) all final orders under section 812 of the Fair Housing Act; and

(7) all final agency actions described in section 20114(c) of title 49.

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

Title 49 United States Code, §3102:

§3102. Requirements for qualifications, hours of service, safety and equipment standards

(1) described in sections 10521 and 10522 of this title; and

(2) to the extent the transportation is in the United States and is between places in a foreign country, or between a place in a foreign country and a place in another foreign country.

(b) The Secretary of Transportation may prescribe requirements for -

(1) qualifications and maximum hours of service of employees of, and safety of operation and equipment of, a motor carrier; and

(2) qualifications and maximum hours of service of employees of, and standards of equipment of, a motor private carrier, when needed to promote safety of operation.

(c) The Secretary may prescribe requirements for the comfort of passengers, qualifications and maximum hours of service of operators, and safety of operation and equipment of a motor carrier of migrant workers. The requirements only apply to a carrier transporting a migrant worker -

(1) at least 75 miles; and

(2) across the boundary of a State, territory, or possession of the United States.

(d) Before prescribing or revising any requirement under this section, the Secretary shall consider the costs and benefits of such requirement.

49 U.S.C. App. §§2501-2506

§2501. Congressional statement of purpose

The purposes of this chapter are to promote the safe operation of commercial motor vehicles, to minimize dangers to the health of operators of commercial motor vehicles and other employees whose employment directly affects motor carrier safety, and to assure increased compliance with traffic laws and with the commercial motor vehicle safety and health rules, regulations, standards, and orders issued pursuant to this Act.

§2502 Congressional findings

The Congress finds that -

(1) it is in the public interest to enhance commercial motor vehicle safety and thereby to reduce highway fatalities, injuries, and property damage;

(2) improved, more uniform commercial motor vehicle safety measures and strengthened enforcement would reduce the number of fatalities and injuries and the level of property damage related to commercial motor vehicle operations;

(3) enhanced protection of the health of commercial motor vehicle operators is in the public interest; and

(4) interested State governments can provide valuable assistance to the Federal Government in assuring that commercial motor vehicle operations are conducted safely and healthfully.

§2503 Definitions

For purposes of this chapter, the term -

(1) "commercial motor vehicle" means any self-propelled or towed vehicle used on highways in interstate commerce to transport passengers or property -

(A) if such vehicle has a gross weight rating of 10,001 or more pounds;

(B) if such vehicle is designed to transport more than 15 passengers, including the driver; or

(C) if such vehicle is used in the transportation of materials found by the Secretary to be hazardous for the purposes of the Hazardous Materials Transportation Act [49 U.S.C.A. s 1801 et seq] and are transported in a quantity requiring placarding under regulations issued by the Secretary under such Act;

* * *

(4) "interstate commerce" means trade, traffic, or transportation in the United States which is between a place in a State and a place outside of such State (including a place outside of the United States) or is between two places in a State through another State or a place outside of the United States;

(5) "intrastate commerce" means any trade, traffic, or Transportation in any State which is not described in paragraph (4);

* * *

(10) "State" means a State of the United State and the District of Columbia and for purposes of sections 2505, 2506, 2507, 2509, and 2515 of this title, includes a political subdivision of a State;

(11) "State law" includes any law enacted or adopted by a political subdivision of a state;

(12) "State regulation" includes any regulation issued by a political subdivision of a State; and

* * *

§2505 Federal regulations

(a) Authority of Secretary

Not later than 18 months after October 30, 1984, the Secretary shall issue regulations pertaining to commercial motor vehicle safety. Such regulation shall establish minimum Federal safety standards for commercial motor vehicles and shall, at a minimum, ensure that -

(1) commercial motor vehicles are safely maintained, equipped, loaded, and operated;

(2) the responsibilities imposed upon operators of commercial motor vehicles do not impair their ability to operate such vehicles safely;

(3) the physical condition of operators of commercial motor vehicles is adequate to enable them to operate such vehicles safely; and

(4) the operation of commercial motor vehicles does not have deleterious effects on the physical condition of such operators.

(b) Elimination or modification of existing motor carrier safety rules

The Secretary shall not eliminate or modify any existing motor carrier safety rule pertaining exclusively to the maintenance, equipment, loading or operation (including routing regulations) of vehicles carrying materials found to be hazardous for the purposes of the Hazardous Materials Transportation Act [49 U.S.C.A. s 1801 et seq.] unless and until an equivalent or more stringent regulation has been

promulgated under the Hazardous Materials Transportation Act.

(c) Procedure; considerations

(1) All regulations under this section shall be issued in accordance with section 553 of Title 5 (without regard to sections 556 and 557 of such title), except that the time periods specified in this subsection shall apply to the issuance of such regulations.

(2) Before issuing such regulations, the Secretary shall, to the extent practicable and consistent with the purposes of this Act, consider (A) costs and benefits, and (B) State laws and regulations pertaining to commercial motor vehicle safety in order to minimize unnecessary preemption of such State laws and regulations under this Act.

(d) Delays; notification of Congress; transmittal of current data

If the Secretary determines that any proceeding initiated to issue any regulation under this section will not be completed within 18 months after October 30, 1984, the Secretary shall immediately notify the Congress and shall furnish the reasons for the delay, information regarding the resources assigned, and the projected completion date for any such proceeding. The Secretary shall transmit to the Congress current data regarding the information specified in the preceding sentence at the end of every 60 day period thereafter during which any such proceeding remains incomplete.

(e) Prior regulations

If the Secretary does not issue regulations pertaining to commercial motor vehicle safety in accordance with this section, regulations pertaining to commercial motor vehicle safety which the Secretary issued before October 30, 1984, and in effect on October 30, 1984, shall, for purposes of this chapter, be deemed to be regulations issued by the Secretary under this section.

(f) Waiver; schoolbuses; publication

After notice and an opportunity for comment, the Secretary may waive, in whole or in part, application of any regulation issued under this section with respect to any person or class of persons if the Secretary determines that such waiver is not contrary to the public interest and is consistent with the safe operation of commercial motor vehicles. Under this subsection, the Secretary shall waive application of the regulations issued under this section with respect to schoolbuses, as defined in section 1391(14) of Title 15, unless the Secretary determines that making such regulations applicable to such schoolbuses is necessary for public safety taking into account all Federal and State laws applicable to such schoolbuses. Any waiver authorized under this subsection shall be published in the Federal Register, together with the reasons for such waiver.

(g) Judicial review

Any final agency action taken under this section shall be subject to judicial review under chapter 7 of Title 5.

P.L. 102-143

Sec. 342. The Secretary of Transportation shall publish by January 15, 1992, a notice of proposed rulemaking with regard to amending the Federal Motor Carrier Safety regulations to prohibit the use of radar detectors in operating commercial motor vehicles. Such notice shall solicit testimony regarding the safety, economic and operational aspects of prohibiting radar detectors in commercial operations.

Regulations

49 CFR part 390

§390.5 Definitions.

* * * * * Radar detector means any device or mechanism to detect the emission of radio microwaves which are employed by enforcement personnel to measure the speed of motor vehicles upon public roads and highways for enforcement purposes. Excluded from this definition are radar detection devices that meet both of the following requirements:

(1) Transported outside the driver's compartment of the vehicle. For this purpose, the driver's compartment of a passenger-carrying CMV shall include all space designed to accommodate both the driver and the passengers; and

(2) Completely inaccessible to, inoperable by, and imperceptible to the driver while operating the vehicle.

49 CFR part 392

§392.71 Radar detectors; use and/or possession.

(a) No driver shall use a radar detector in a commercial motor vehicle, or operate a commercial motor vehicle that is equipped with or contains any radar detector.

(b) No motor carrier shall require or permit a driver to violate paragraph (a) of this section.

Executive Orders

Executive Order 12612

Federalism

October 26, 1987

By the authority vested in me as President by the Constitution and laws of the United States of America, and in order to restore the division of governmental responsibilities between the national government and the States that was intended by the Framers of the Constitution and to ensure that the principles of federalism established by the Framers guide the Executive departments and agencies in the formulation and implementation of policies, it is hereby ordered as follows:

Section 1. Definitions. For purposes of this Order:

(a) "Policies that have federalism implications" refers to regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

(b) "State" or "States" refer to the States of the United States or America, individually or collectively, and, where relevant, to State governments, including units of local government and other political subdivisions established by the States.

Sec. 2. Fundamental Federalism Principles. In formulating and implementing policies that have federalism implications, Executive departments and agencies shall be guided by the following fundamental federalism prinicples:

(a) Federalism is rooted in the knowledge that our political liberties are best assured by limiting the size and scope of the national government.

(b) The people of the States created the national government when they delegated to it those enumerated governmental powers relating to matters beyond the competence of the individual States. All other sovereign powers, save those expressly prohibited the States by the Constitution, are reserved to the States or to the people.

(c) The constitutional relationship among sovereign governments, State and national, is formalized in and protected by the Tenth Amendment to the Constitution.

(d) The people of the States are free, subject only to restrictions in the Constitution itself or in constitutionally authorized Acts of Congress, to define the moral, political, and legal character of their lives.

(e) In most areas of governmental concern, the States uniquely possess the constitutional authority, the resources, and the competence to discern the sentiments of the people and to govern accordingly. In Thomas Jefferson's words, the States are "the most competent administrations for our domestic concerns and the surest bulwarks against antirepublican tendencies."

(f) The nature of our constitutional system encourages a healthy diversity in the public policies adopted by the people of the several States according to their own conditions, needs, and desires. In the search for enlightened public policy, individual States and communities are free to experiment with a variety of approaches to public issues.

(g) Acts of the national government--whether legislative, executive, or judicial in nature--that exceed the enumerated powers of that government under the Constitution violate the principle of federalism established by the Framers.

(h) Policies of the national government should recognize the responsibility of--and should encourage opportunities for--individuals, families, neighborhoods, local governments, and private associations to achieve their

personal, social, and economic objectives through cooperative effort.

(i) In the absence of clear constitutional or statutory authority, the presumption of sovereignty should rest with the individual States. Uncertainties regarding the legitimate authority of the national government should be resolved against regulation at the national level.

Sec. 3. Federalism Policymaking Criteria. In addition to the fundamental federalism principles set forth in section 2, Executive departments and agencies shall adhere, to the extent permitted by law, to the following criteria when formulating and implementing policies that have federalism implications:

(a) There should be strict adherence to constitutional principles. Executive departments and agencies should closely examine the constitutional and statutory authority supporting any Federal action that would limit the policymaking discretion of the States, and should carefully assess the necessity for such action. To the extent practicable, the States should be consulted before any such action is implemented. Executive Order No. 12372 ("Intergovernmental Review of Federal Programs") remains in effect for the programs and activities to which it is applicable.

(b) Federal action limiting the policymaking discretion of the States should be taken only where constitutional authority for the action is clear and certain and the national activity is necessitated by the presence of a problem of national scope. For the purposes of this Order:

(1) It is important to recognize the distinction between problems of national scope (which may justify Federal action) and problems that are merely common to the States (which will not justify Federal action because individual States, acting individually or together, can effectively deal with them).

(2) Constitutional authority for Federal action is clear and certain only when authority for the action may be found in a specific provision of the Constitution, there is no provision in the Constitution prohibiting Federal action, and the action does not encroach upon authority reserved to the States.

(c) With respect to national policies administered by the States, the national government should grant the States the maximum administrative discretion possible. Intrusive, Federal oversight of State administration is neither necessary nor desirable.

(d) When undertaking to formulate and implement policies that have federalism implications, Executive departments and agencies shall:

(1) Encourage States to develop their own policies to achieve program objectives and to work with appropriate officials in other States.

(2) Refrain, to the maximum extent possible, from establishing uniform, national standards for programs and, when possible, defer to the States to establish standards.

(3) When national standards are required, consult with appropriate officials and organizations representing the States in developing those standards.

Sec. 4 Special Requirements for Preemption. (a) To the extent permitted by law, Executive departments and agencies shall construe, in regulations and otherwise, a Federal statute to preempt State law only when the statute contains an express preemption provision or there is some other firm and palpable evidence compelling the conclusion that the Congress intended preemption of State law, or when the exercise of State authority directly conflicts with the exercise of Federal authority under the Federal statute.

(b) Where a Federal statute does not preempt State law (as addressed in subsection (a) of this section), Executive departments and agencies shall construe any authorization in the statute for the issuance of regulations

as authorizing preemption of State law by rule-making only when the statute expressly authorizes issuance of preemptive regulations or there is some other firm and palpable evidence compelling the conclusion that the Congress intended to delegate to the department or agency the authority to issue regulations preempting State law.

(c) Any regulatory preemption of State law shall be restricted to the minimum level necessary to achieve the objectives of the statute pursuant to which the regulations are promulgated.

(d) As soon as an Executive department or agency foresees the possibility of a conflict between State law and Federally protected interests within its area of regulatory responsibility, the department or agency shall consult, to the extent practicable, with appropriate officials and organizations representing the States in an effort to avoid such a conflict.

(e) When an Executive department or agency proposes to act through adjudication or rule-making to preempt State law, the department or agency shall provide all affected States notice and an opportunity for appropriate participation in the proceedings.

Sec. 5. Special Requirements for Legislative Proposals. Executive departments and agencies shall not submit to the Congress legislation that would:

(a) Directly regulate the States in ways that would interfere with functions essential to the States' separate and independent existence or operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions;

(b) Attach to Federal grants conditions that are not directly related to the purpose of the grant; or

(c) Preempt State law, unless preemption is consistent with the fundamental federalism principles set forth in section 2, and unless a clearly legitimate national

purpose, consistent with the federalism policymaking criteria set forth in section 3, cannot otherwise be met.

Sec. 6. Agency Implementation. (a) The head of each Executive department and agency shall designate an official to be responsible for ensuring the implementation of this Order.

(b) In addition to whatever other actions the designated official may take to ensure implementation of this Order, the designated official shall determine which proposed policies have sufficient federalism implications to warrant the preparation of a Federalism Assessment. With respect to each such policy for which an affirmative determination is made, a Federalism Assessment, as described in subsection (c) of this section, shall be prepared. The department or agency head shall consider any such Assessment in all decisions involved in promulgating and implementing the policy.

(c) Each Federalism Assessment shall accompany any submission concerning the policy that is made to the Office of Management and Budget pursuant to Executive Order No. 12291 or OMB Circular No. A-19, and shall:

(1) Contain the designated official's certification that the policy has been assessed in light of the principles, criteria, and requirements stated in sections 2 through 5 of this Order;

(2) Identify any provision or element of the policy that is inconsistent with the principles, criteria, and requirements stated in sections 2 through 5 of this Order;

(3) Identify the extent to which the policy imposes additional costs or burdens on the States, including the likely source of funding for the States and the ability of the States to fulfill the purposes of the policy; and

(4) Identify the extent to which the policy would affect the States' ability to discharge traditional State governmental functions, or other aspects of State sovereignty.

Sec. 7. Government-wide Federalism Coordination and Review. (a) In implementing Executive Order Nos. 12291 and 12498 and OMB Circular No. A-19, the Office of Management and Budget, to the extent permitted by law and consistent with the provisions of those authorities, shall take action to ensure that the policies of the Executive departments and agencies are consistent with the principles, criteria, and requirements stated in sections 2 through 5 of this Order.

(b) In submissions to the Office of Management and Budget pursuant to Executive Order No. 12291 and OMB Circular No. A-19, Executive departments and agencies shall identify proposed regulatory and statutory provisions that have significant federalism implications and shall address any substantial federalism concerns. Where the departments or agencies deem it appropriate, substantial federalism concerns should also be addressed in notices of proposed rule-making and messages transmitting legislative proposals to the Congress.

Sec. 8 Judicial Review. This Order is intended only to improve the internal management of the Executive branch, and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person.

RONALD REAGAN
THE WHITE HOUSE
October 26, 1987.

Exec. Order No. 12612, 52 FR 41685, 1987 WL 181433 (Pres.)

Senate Appropriations Committee Report
S. Rep. No. 150,
103d Cong., 1st Sess. 111-12 (1993):

Radar detectors. - The FHWA has indicated that there is inadequate information on the role of radar detectors in crashes involving commercial motor vehicles. Although accident causation is difficult to determine, it would be worthwhile to obtain quantitative data to determine whether commercial motor vehicles with radar detectors are overrepresented in crashes that involve speeding by operators of commercial motor vehicles. To this end, the Committee directs the FHWA, working in cooperation with the National Highway Traffic Safety Administration, the Commercial Vehicle Safety Alliance, the National Association of Governors' Highway Safety Representatives, and various State and local enforcement agencies, to conduct a study indicating the presence, or lack thereof, of radar detectors in commercial motor vehicles that were involved in crashes in which commercial drivers were believed to have been or where charged with exceeding the posted speed limit. Also, FHWA should also determine the presence, or lack thereof, of radar detectors in the population of commercial motor vehicles. A comparison of these two proportions should be used to determine whether commercial motor vehicles with radar detectors are overrepresented in crashes that involve speeding.

The analysis must meet strict criteria for reliability and validity so that its results are not suspect. In developing this report, the FHWA may use the funds provided under the Motor Carrier Safety Assistance Program or funds provided under its operating expense research program. The Committee notes that there are

several potential sources of data for this research. These include: crash reports collected by State highway enforcement officers or officers working under the Motor Carrier Safety Assistance Program, in depth accident investigations currently conducted by some States, or a special study to be conducted by MCSAP officers. The report should be statistically representative and valid. Raw data collected by the Agency should be forthcoming by April 1, 1994, to the Committee with a final report to be transmitted by July 1, 1994.

The Committee is displeased that the FHWA has not moved forward with rulemaking that would ban radar detectors in commercial motor vehicles. The Committee directs that the Administrator and the Associate Administrator inform the Committee as soon as possible on the future direction that the Agency will pursue regarding this matter.

Excerpt of transcript of hearings before a subcommittee on Appropriations House of Representatives 103 Congress 1st Session Page 597-598

RADAR DETECTORS

Mr. Wolf. Now, radar detectors on commercial trucks, what are your feelings about them?

Mr. Carlson. With regard to safety, all I can tell you is the status of where we are. We received many thousand comments from our notice of proposal to ban radar detectors in commercial vehicles. They were on both sides of the issue obviously. There were some manufacturers that seemed to have a form letter, a large percentage were those.

There were also people on the other side of the issue saying they definitely should be banned because it is an attempt to get around the law and drive at a higher speed and therefore it is unsafe. We do know that higher speeds create a more difficult fatality situation.

Mr. Wolf. Have you looked at it with regard to trucks exclusively?

Mr. Carlson. That was the proposed result we had in the Federal Register. We are analyzing the final results. Certainly this administration will take a position on it, but it has not yet to my knowledge.

Mr. Wolf. So the rulemaking would take what effect? You are moving toward actually issuing a regulation or would it be better to have that in law and would there be a fine with it? How would you work that? The Secretary was very sympathetic with it when he was here.

Mr. Eicher. Well, Congressman Wolf, in our regulatory process, the next step would be a final rule if the decision is made to proceed. As Mr. Carlson mentioned, we got 26,000 comments.

Mr. Wolf. How many for and how many against?

Mr. Eicher. 6,400 responders supported the ban and 19,700 opposed it. Now, you have to add some caveats to that, Congressman Wolf. On the "against" side, a little over 19,000 of those were really signatures to petitions that must have been orchestrated probably by the manufacturers. On the "pro" side, there is about 5,100 to 5,200 letters that were form letters.

Mr. Wolf. What was the reaction in most of the states, the highway safety people in the different states?

Mr. Eicher. The safety interests and the highway safety interest generally support the ban.

Mr. Wolf. How about the State departments?

Mr. Eicher. We did not hear from any states at all. One of the arguments that can be advanced is that it could be a States' right issue. As you well know, Congressman Wolf, the District of Columbia and Virginia prohibit the use in all vehicles.

Mr. Wolf. I heard a few other states did but one state repealed them.

Mr. Eicher. Connecticut did prohibit the use of radar detectors in commercial vehicles. I heard earlier this week that they may have rescinded that.

Mr. Wolf. Do you have any data as to whether or not that helps, any safety data that has been collected?

Mr. Eicher. No. The problem is the inability to isolate that one factor from the reams and reams of data that we do analyze. There is just no good data to substantiate or refute a good quantitative argument that makes sense.

Mr. Wolf. If you have any information from the Federal highways on that issue, I would appreciate it if you could get it to me.

[The information follows:]

A research literature survey focusing on the relationship between radar detectors, speeding and accidents was conducted as part of the Federal Highway

Administration's preliminary regulatory evaluation for the Notice of Proposed Rulemaking to ban radar detectors. The sources do not, in themselves, substantiate a direct link between radar detector use and commercial motor vehicle accidents, nor do they establish a clear relationship between the radar detector bans already in effect (in Connecticut, the District of Columbia, New York, and Virginia) and enhanced commercial motor vehicle safety.